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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1959.

No. 517

QUALITY COAL CORPORATION
AN INDIANA CORPORATION,
Petitioner.

vs.

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

PAGE

Report of Case 1, 2

Basis of Jurisdiction 2

Questions Presented 2-4

Statute Involved 4

Statement of the Case 4, 5

Basis for Federal Jurisdiction in Trial Court 6

Reasons Relied on for Granting Writ 6-16

1. The Agreement Was Illegal by Virtue of Petitioner Being Forced to Operate a Closed Shop. 6-11

2. The Majority Opinion that the "Savings Clause" Legalized the Contract Is in Conflict with General Principles of Law 11

3. The Agreement Was an Integrated Instrument and Any Illegal Provision Therein Destroyed the Entire Agreement 11-13

4. The Contract Was Void Because It Was Made Under Duress 13, 14

5. The Contract Was Unilateral and Void 14

6. Indispensable Parties Were Lacking 14, 15

7. No Trust Was Created and Therefore the Plaintiffs Could Not Bring This Cause of Action. 15, 16

Conclusion 16, 17

APPENDIX.

Majority Opinion of Court of Appeals (Appendix I) 19-25
Dissenting Opinion of Court of Appeals (Appendix IA) 26-29
Judgment of Court of Appeals (Appendix II) 30
Order Denying Petition for Rehearing (Appendix III) 31
Issuance of Mandate Stayed until November 13, 1959, (Appendix IV) 32

(Appendix V.)

Statutes Involved 33, 34
29 U. S. C. A. 158 (a) (1), (A) (3), (B) (1), (B) (2) and 157, (Appendix V) 34

Affidavits (Petitioners):
Carl F. Kumpf 34, 35
John Gettle 35
Fred Lister 35, 36
Clayton Weaver 36

Respondent's Affidavits and Exhibits 36-46
Agreement of 1950 effective September 1, 1955 ..... 36, 37
Agreement of 1950 effective October 1, 1956 ..... 37, 38
Agreement of 1950 effective to June 30, 1952 38-40
Affidavit of Josephine Roche 40, 41
Exhibit "G" (International Unions Const.) 42
Exhibit "H-1" (International Unions Const.) 42, 43
Exhibit "H-2" (International Unions Const.) 43
Affidavit of Wilbert Killion 44-46

Petitioners' Affidavit in Rebuttal 46-52
Arthur Kumpf 46, 47
Jack Lynch 47, 48
Joseph Jenkins 49, 50
Carl Kumpf 50-52

Authorities Cited.

Birmingham v. Barters, 157 Fed. (2) 295 13
Brown v. National Union, 104 Fed. Supp. 685 10
Davis v. Davis, 197 Ind. 386, 151 NE 134 14
Kraus v. Kraus, 235 Ind. 325, 132 NE 2d 608 16
Lewis et al. v. Benedict Coal Corp., 259 Fed. (2) 346 ..... 12, 13, 15
Lewis et al. v. Fentriss, 264 Fed. (2) 134 11
Lewis et al. v. Quality Coal Corp., 243 Fed. 2 770 14
N. L. R. B. v. Broderick Wood Products Co., 261 Fed. (2) 548 ..... 9, 12
N. L. R. B. v. Gaynor News Co., 197 Fed. (2) 719 11
N. L. R. B. v. Gottfried Baking Co., (2d Cir.) 210 Fed. (2) 772 ..... 8, 11, 12
N. L. R. B. v. McGraw & Co., 206 Fed. (2) 635 ..... 9, 10, 11
N. L. R. B. v. E. F. Shuck Construction Co., 243 Fed. (2) 519 ..... 9, 11
N. L. R. B. v. United Brotherhood C. & J., 202 Fed. (2) 516 8
N. L. R. B. v. United Electric R. & M. Wrks., 203 Fed. (2) 673 10
Red Star Express Lines v. N. L. R. B., 196 Fed. (2) 78 ..... 8, 11
Standard v. Olson, 75 Supp Ct. 768 7

Statutes Cited.

29 USCA 157 4
29 USCA 158, (A) (1), (A) (3), (B) (1), (B) (2) 4

IN THE

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OCTOBER TERM, A. D., 1959.

No.

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vs.

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE, AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause.

OPINIONS BELOW.

The opinion of the District Court has not been reported. It is set forth at pp. 240, 241 of Appendix of Record accompanying and printed together with petitioner's origi-

nal brief filed in the Court of Appeals. (Said Appendix is hereinafter referred to as "Record".)

The opinion of the Circuit Court of Appeals for the Seventh Circuit has been reported at 270 Fed. 2d 140. A copy is appended as Appendix I. The dissenting opinion is appended as Appendix IA.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 18, 1959. (*Infra*, Appendix II.) A Petition for Rehearing was denied on September 24, 1959 with Circuit Judge Schnackenberg voting to grant a rehearing. (*Infra*, III.) A Stay of Mandate pending disposition by said Court was granted extending the time to November 13, 1959. (Appendix IV.) The jurisdiction of this Court is invoked under provisions of 28 U. S. C. A., Section 1254(1).

Jurisdiction was conferred upon the United States Court of Appeals for the Seventh Circuit by 28 U. S. C. A. 1291.

QUESTIONS PRESENTED.

Petitioner, in the trial court, filed a Motion to Dismiss and for judgment on the pleadings, it was later titled Motion for Summary Judgment. (Record page, 205.) The aforesaid Motion is as follows:

> "Defendants respectfully pray this Honorable Court that the complaint in the above case be dismissed and the judgment on the pleadings herein be entered for the defendants on the grounds that:
>
> "1. The complaint fails to state a legal claim against defendant upon which relief can be granted.
>
> "2. The plaintiffs lack the capacity to sue in the above cause.
>
> "3. That the United Mine Workers of America are indispensable parties to this action.
>
> "4. That plaintiffs are not the real or proper parties in interest."

In view of this Motion several propositions under the law and facts were submitted to the trial Court, and Petitioner's Motion was overruled. These propositions are:

1. Was a trust ever created?

A. Since no money had ever been transferred, nor delivered to the alleged fund, then no trust was created and plaintiffs could not sue as trustees of a trust that was not in existence for a corpus that might accrue in the future.

2. The Agreement was void because of a closed shop provision in the contract which was in violation of the Taft-Hartley Act.

A. The Agreement, among other things, provided: "• • • as a condition of employment, all employees shall be, or become members • • • to the extent and in the manner permitted by law • • •"

Admitted facts in the record show that in the operation under the Agreement at petitioner's mine, a closed shop was forced on them. (Record pp. 100-107.) Respondents attempted to negative this evidence. (Record pp. 159-164.) Petitioner sustained the violation of the Taft-Hartley Act. (Record pp. 193-198.)

3. The contract was void because it was made under duress.

A. Admitted facts sustained this contention. (Record pp. 101-105, Record pp. 193-198.)

4. The contract was unilateral and void.

A. Petitioner was the only signatory bound by the Agreement. Respondents were not signatories.

5. Indispensable parties were lacking.

A. The United Mine Workers of America did not sign the Agreement and were the only parties who could declare a violation of said agreement.

6. There was a dispute as to a genuine issue on material facts, and the judgment is contrary to law.

A. The evidence is replete to sustain petitioner. (Record pp. 101-105, Record pp. 159-164, Record pp. 193-198.)

STATUTES INVOLVED.

The pertinent statutory provisions are printed in appendix V, pages 33, 34 and are as follows to-wit:

29 U. S. C. A. 158, 8(A)(1), 8(A)(2), 8(A)(3).
29 U. S. C. A. 158, 8(B)(1), 8(B)(2).
29 U. S. C. A. 157.

STATEMENT OF THE CASE.

Respondents, as trustees of the United Mine Workers of America Welfare and Pension Fund, filed suit for $84,176.40 by reason of an agreement wherein petitioner allegedly agreed to pay 40¢ a ton on all coal produced for a period of two years.

The petitioner filed affirmative defenses, (Record pp. 40-47), respondents filed motion for a summary judgment (Record pp. 56, 57), and the petitioner filed a cross motion for summary judgment seeking an adjudication because respondents did not have a legal claim for the reason that unfair labor practices had been committed by the United Mine Workers of America in violation of 29 U. S. C. A. 158 (A)(1), (A)(2), (A)(3), (B)(1), and (B)(2), and for the further reason that a closed shop was forced upon the petitioner against his will and for the further reason that indispensable parties were lacking. The District

Court overruled petitioner's motion for summary judgment and granted respondents' motion for summary judgment by adopting its memorandum opinion filed by them, which is set out at Record pp. 240, 241.

Petitioner appealed to the Court of Appeals. The Court of Appeals, by a two to one decision, affirmed the judgment of the District Court. Petitioner's petition for rehearing was likewise denied by a two to one decision.

Adjudication of the issues by the pleadings and affidavits, which are admitted facts, and other material in the case, sustained the petitioner's contentions that the statutes were violated by reason of the agreements sued on.

Section 158 (A)(3) forbids a closed shop agreement and the agreements upon which suit was brought conclusively shows that it was a prerequisite and mandatory that all employees "shall be, or become members * * *". The admitted facts in the record conclusively show that in the operation under the agreement at petitioner's mines, a closed shop was forced upon the operators by compelling non-union employees to join the union by the morning of the third day or get fired, and not giving them the 30 day grace period following the beginning of their employment as required by the Taft-Hartley Act.

Since the contract was null and void under the Taft-Hartley Act by virtue of the closed shop being forced upon petitioner, the pseudo defense that the "savings clause" legalized the contract does not merit consideration for the reason that the contract was an integrated instrument and its respective provisions were interdependent upon one another and the contract had to be considered as a whole, and since one part was illegal, then the entire agreement was a nullity.

BASIS FOR FEDERAL JURISDICTION IN TRIAL COURT.

The respondents, trustees of said fund, maintained their residence and place of business at 907 Fifteenth Street, N. W., in Washington, of the District of Columbia. Trustee John L. Lewis is a citizen of the State of Illinois. Trustee Henry G. Schmidt is a citizen of the State of Ohio. Trustee Josephine Roche is a citizen of the State of Colorado. The petitioner, Quality Coal Corporation, a corporation, was organized and exists under the laws of the State of Indiana, located in Clay County in the State of Indiana. Due to the diversity of citizenship of the litigants, and the fact that the amount in controversy exceeded $3000.00, the United States District Court for the Southern District of Indiana, Terre Haute Division, had jurisdiction.

REASONS RELIED ON FOR GRANTING WRIT.

I. The Agreement Was Illegal by Virtue of Petitioner Being Forced to Operate a Closed Shop.

(A) The Majority Opinion Is at War with General Principles of Established Law.

This case raises important questions of Federal Law wherein various Circuit Courts of Appeal are in irreconcilable conflict with one another and therefore should be settled by this Court. The conflict existing between the several Federal Circuits fully appears to be one of fact as well as principle of law. We preface our reasons why certiorari should be granted by stating that there isn't any question but what the agreement was unlawful and that the defense of violation of the Taft-Hartley Act has been conclusively shown. Certiorari should further be granted so that for once and for all, there shall be a unity among the various circuits in determining similar questions and ap-

plying a rule of law that will be binding on all sections of the country.

We cannot overlook the comment made by Circuit Judge Schnackenberg in the dissenting opinion in which the Court of Appeals for the Seventh Circuit affirmed this cause of action. His statement at page 8 was, "As far as this case is concerned, by judicial decision, a part of a federal act has in effect been repealed. The act was not saved; a contractual provision in violation of the act is saved."

In *Standard* v. *Olsen* (1954), 75 Sup. Ct. 768, 771, the Court said: "It is for Congress, not the Courts, to write the law."

Facts in the Record.

The admitted and undisputed facts in the record conclusively show that in the operation under the agreement at petitioner's mines, a closed shop was forced upon the operator. The evidence is replete that an employee who is not a member of the Union, when hired, has until the morning of the third day to belong to the Union or quit or get fired. He is deprived of the 30-day grace period, under Section 8(A)(3) of the Act; that if said non-union employee refused to join the Union on the morning of the third day, then the Union's employees would refuse to work by virtue of instructions of the District Union whose Article 9, Section 2 of the Constitution of the U. M. W. of A., is:

> "That all members of the organization shall refuse to work in and around a mine where a man or men work that does not belong to the Union." (Record p. 100.)

This is further sustained by other evidence of three other individuals which is not disputed, at Record pp. 105, 106 and 107.

(B) The Reasoning of the Majority Opinion Is Inconsistent with General Principles of Law.

The majority opinion holding that 29 U. S. C. A., Section 158(A)(3) was not violated is in direct conflict with *N. L. R. B.* v. *Gottfried Baking Co.*, 2d Circuit 1954, 210 Fed. (772), which, among other things held:

> "The preferential hiring clause • • • was clearly illegal as it excludes new applicants at the threshold if they are not members • • •, and deprives them of the 30-day grace period • • • We think that the mere execution of a contract containing such a provision, even apart from its actual enforcement, constitutes 'discrimination in regard to hire' on the part of an employer and falls squarely within the prohibition of Section 8(A)(3) for as this Court, in so holding, stated in *Red Star Express Lines* v. *N. L. R. B.* (1958), 196 Fed. 2d 78, 81: 'The existence of such agreement without more tends to encourage membership in a labor organization • • •.'"

This Court further stated:

> "Since the Union joined in the execution of the contracts contained these illegal provisions and assisted in enforcing them, it follows that the Union 'cause (d) • • • an employer to discriminate against an employee in violation of Section 8(A)(3)' thus violating Section 8(B)(2)."

The majority opinion is in irreconcilable conflict with the Ninth Circuit (1953). The Ninth Circuit in *N. L. R. B.* v. *United Brotherhood C. & J.* (1953) (9th), 202 Fed. (2d) 516, 518, held:

> "An agreement with Employer that only those employees who belonged to Union, or who were referred by that Union, would be hired by the employer, which agreement was of sufficient potency to cause the employer to refuse to hire in violation of the Agreement for fear the Union would be 'on its neck,' was guilty

of unfair labor practices under both Section 8(B)(1)(A) and Section 8(B)(2) of the Taft-Hartley Act."

The majority opinion likewise is in square conflict with the Circuit (1953). In *N. L. R. B.* v. *McGraw and Company* (1953), 206 Fed. (2) 635, 639, the Court ruled:

> "That Section 8(B)(1)(A) and Section 8(B)(2) are violated by a Union if it enters into, maintains or causes the enforcement of a closed shop agreement with an employer, or if it arranges with the employer that Union employees will be given priority * * *".
>
> "A Union which executed with an employer an alleged security contract which threatened employees with loss of their jobs if they did not become members of the Union violated Section 8(B)(1)(A). *Re Bowen* 93 NLRB 1147."

The majority opinion likewise conflicts with the Tenth Circuit in *N. L. R. B.* v. *Broderick Wood Products Co.*, 10th Circuit (1958), 261 Fed. 2d 548. The *Broderick* case, at p. 555, under the Union Security clause in the last sentence thereof, read:

> "Preference shall be given, in hiring new employees to members of the Union who are capable, in the opinion of the Employer, to perform the work in the Employer's plant."

The Court held, at p. 556:

> "It is settled law that the mere execution of an illegal security clause without more is a violation of the Act * * *"

The majority opinion is again in conflict with the Ninth Circuit. In *N. L. R. B.* v. *E. F. Shuck Construction Co.*, 9 Cir., 243 F. 2d 519, at p. 521, the Court stated, concerning another illegal union-security clause:

> "The mere retention of such a clause in a contract in force between the parties is a continuing unfair labor practice even where there is no attempt to enforce it,

> because so long as it remains a part of the contract it 'tends to encourage membership in a labor organization' in violation of Section 8(a)(3)."

Petitioner submits that if the 30 day period was omitted from the agreement, the Act mandates that the employee shall have 30 days grace to join the Union. It was held in *N. L. R. B.* v. *United Elect. R. & M. Wkrs.*, 203 Fed. (2) 673, 676, that the minimum joining period of 30 days must be read into every agreement.

(C) Majority Opinion Nullifies 29 U. S. C. A. 157 and U. S. C. A. 158 (B) (1) (B) (2).

The Opinion at page 5 among other things states:

> "The validity of the agreement is not affected by any conduct or practice of the parties which would constitute an unfair labor practice under 29 USCA, Sec. 158(A)(3)."

This in effect nullifies Sec. 157 and approves the Union's action in forcing non-union employees to join in violation of Sec. 8(B)(1) and 8(B)(2).

The Court continued:

> "At most, such conduct or practice not authorized by the argument itself would show that the Union and Quality violated applicable law. It would not alter or change the terms of the agreement."

Assuming the agreement did not authorize such conduct the sections of the above acts prohibited such conduct. This decision indirectly repealed these laws.

The fact that petitioner complied with the demand to hire only Union men or impliedly compelled them to join the Union on the third day, did not exonerate the Union from violating Sec. 8(B)(1)(A) and (B)(2). *Brown* v *National Union* (1951), 104 Fed. Supp. 685, *N. L. R. B.* v.

McGraw, 206 Fed. 2d 635. (Quoted at page 9 of this petition.)

Forcing non-union employees to join the Union on the morning of the third day not only violated Section 8(A)(3) but violated 29 USCA, Section 157.

II. The Majority Opinion That the "Savings Clause" Legalized the Contract Is in Conflict with General Principles of Law.

The majority opinion admits the Agreement violates Section 158.(a)(3) if it were not for the so-called "savings clause" which is, "to the extent and in the manner permitted by law * * *" It justifies its decision upon *Lewis v. Fentress*, 264 Fed. 2d 134, which involves none of the questions which were decided by the majority opinion. The *Fentress* decision was made on matters completely outside of the issues involved in this cause and completely ignored the undisputed facts in the record. Primarily, it was made on the proposition that there was no alteration or change in the terms of the contract and brushed off the important matter as to whether or not there was a violation of a closed shop. The majority opinion and the *Fentress* case are in direct conflict with the majority of the circuits. Similar alleged "savings clauses" were held to be of no effect in *NLRB v. Gaynor News Co.* (2nd Cir.), 197 Fed. (2) 719, 723; *NLRB v. Shuck Constr. Co.* (9th Cir.), 243 Fed. (2) 519, 521; *NLRB v. Gottfried Baking Co.* (2nd Cir.), 210 Fed. (2) 772; and *Red Star Express Lines v. NLRB*, 196 Fed. (2) 78, 81. As stated in the dissenting opinion the *Gaynor* case was affirmed by the Supreme Court on February 1, 1954.

III. The Agreement Was an Integrated Instrument and Any Illegal Provision Therein Destroyed the Entire Agreement.

The "savings clause" being a provision of the Agreement and since the respective provisions were interdependent on one another, the Agreement had to be considered in its entirety. Therefore, the illegal provision destroyed the entire Agreement. (*Lewis et al. v. Benedict Coal Corp.* (1958), 259 Fed. 2d 346, 354.)

It was likewise held in *NLRB* v. *Broderick Wood Product Co., et al.* (1985), 261 Fed. 2d 548, 555, 556, 557 that the savings clause did not salvage or save the illegal clause in the contract. The Court stated, at p. 558:

> "The mere execution of a legal clause * * * is itself an unfair labor practice within the Act. The savings clause does not avoid that rule."

It can readily be seen that the mere retention and the mere execution of such clauses is a violation without proof of the act showing the violation.

The Second Circuit in *NLRB* v. *Gottfried Baking Co.*, 210 Fed. (2) 772 at 780 stated:

> "Nor is it of consequence, as the respondents contend, that each of the contracts contained a 'savings clause' the intended effect of which was to salvage as much union security as possible should the preferential hiring provisions be invalidated. The inclusion of this vague 'savings clause' in each contract does not purge the preferential hiring provisions of their illegal effect."

The majority opinion (p. 4) commented:

> "The qualified condition imposed is expressed as one complete provision. Its application is not to be measured by some standard found elsewhere in the contract."

How can this be reconciled with the clause in the contract as follows, to-wit:—

> "This Agreement is an integrated instrument and its respective provisions are interdependent and shall be effective from and after March 5, 1950." (Record p. 61.)

This is in direct conflict with *Lewis et al. v. Benedict Coal Corp.* (1958), 261 Fed. 2d 548, 555, 556, 557, and others.

IV. The Contract Was Void Because it Was Made Under Duress.

The majority opinion states that there is no merit to petitioner's claim that the Agreement was invalid because of duress: It states:—

> "The threat to cause a legal strike and its attendant work stoppage does not of itself constitute duress and mere inequality in economic bargaining power is not legal unfairness which will permit either party to avoid a contract."

This statement is quoted from *Birmingham v. Bartels*, 157 Fed. 2d 295. The majority opinion no doubt, in quoting from the *Birmingham* case, overlooked part of the *Birmingham* opinion in this, to-wit:—

> "A Court of law cannot acknowledge a contract because of alleged unfairness in the negotiation by which the obligation has been created, *unless the unfairness amounts to duress or fraud capable of avoiding the contract. Duress or fraud has not been set up here, nor has either of them attempted to be proved.*" (Our emphasis.)

Numerous undisputed affidavits are in the record showing that duress was perpetrated on this operator. (Record pp. 101-105; Record pp. 193-198.) The *Birmingham* case with the omission considered over rules the majority opin-

ion. In the case at Bar the evidence was replete that the operator was coerced in executing the Agreement, and the evidence sustained the affirmative defenses.

V. The Contract Was Unilateral and Void.

Since the contracting parties were the United Mine Workers of America and the petitioner Quality Coal Corporation, and the action was brought by a non-signatory to the Agreement, and only the petitioner is bound by the Agreement and no obligation is placed upon the respondents by virtue of the Agreement, then it results in a unilateral agreement wherein only petitioner is bound and there is a lack of mutuality of obligation which is an essential element in every enforceable agreement. (*Davis* v. *Davis*, 197 Ind. 386, 151 N. E. 134.)

VI. Indispensable Parties Were Lacking.

The majority opinion states that this proposition was answered in a former case involving the same litigants and reported in 243 Fed. 2d 770, 772. With deference to the majority opinion the *Lewis* case cited is of no bearing for the reason that there were no pleadings filed in the first *Quality* case which raised these issues. The *Carter* case pertained to the interpretation of the Miller Act and the contract therein provided:

> "The Trustees had sole power to demand and enforce prompt payment of employer contributions."

There was no such clause in the contracts involved in this litigation, and since the *Carter* case involved the interpretation of the Miller Act relative to construction work on Federal projects, the Court made its decisions on matters not in issue in this case. The *Embassy* case is not in point for the reason it is foreign to the issues at stake.

The majority opinion relative to indispensable parties is contrary to the 2nd Circuit, *Lewis et al. v. Benedict Coal Company*, 259 Fed. (2), 346, 354, which held the Union to be indispensable parties. It was said:

> "Hence we conclude that obligation to make payments to the Trustees was dependent upon performance by the Unions of their obligations, and consequently the District Court was correct in ruling that the Trustees were third party beneficiaries of the contract and subject to the defense arising from breaches by the Union."

Since the Union was a signatory to the contract and they were the only ones who could declare at their option a violation of the Agreement (Record p. 127), and they did exercise this option on October 13, 1955 (Record p. 198), then it goes without saying that the Union was indispensable so that if there were any defenses by reason of illegal strikes, etc., they could have been raised as was done in the *Benedict* case herein cited.

VII. No Trust Was Created and Therefore the Plaintiffs Could Not Bring This Cause of Action.

Petitioner submits that there must be delivery of the corpus or there can be no trust.

At pages 2 and 3 of the majority opinion, the Court concluded that a trust was created. With deference to the majority opinion, we are unable to reconcile this rule in view of re-statement of trusts 1935, Section 76, which reads:

> "The subject matter of a trust must be definitely ascertainable from the facts existing at the time of the execution of the trust."

Likewise, a clause under said Section 76 provides:

> "A trust cannot be created if the thing which would

be the subject matter of the trust cannot be ascertained until a future time."

We respectfully submit that the holding in the majority opinion is in direct conflict with the established rule of law in the State of Indiana, that there can be no trust created without delivery. (*Kraus* v. *Kraus*, 235 2nd 325, 132 N. E., 2nd, 608.)

CONCLUSION.

Petitioner submits that the writ of certiorari should be granted because it is of great public importance for the following reasons:—

1. It is in conflict with the 2nd, 9th and 10th United States Courts of Appeal.

2. It is likewise in conflict with the United States Supreme Court.

3. The Agreement was in violation of Section 158 (a) (3).

4. The Union violated Section 158 (b) (1) and (b) (2).

5. The Union violated Section 157 in refusing employees rights under the act.

6. The undisputed facts in the record conclusively show that petitioner was forced to maintain a closed shop.

7. There was no separability clause as the contract was integrated and the provisions were interdependent upon one another and the illegality of a clause of the contract destroys the entire contract.

8. The evidence conclusively shows that a non-union employee had to join the Union by the morning of the third day or get fired and if such employee refused to join the Union, then the Union employees would refuse to work by virtue of the Union's by-laws. The 30 day grace period

under Section 8 (a) (3) was not complied with and was ignored.

9. The evidence is replete that the operator (petitioner) was forced, under duress, to execute the contracts.

10. No trust was ever created.

11. The United Mine Workers of America were necessary and indispensable parties to this lawsuit.

12. The contract was unilateral in that none other than the petitioner was compelled to perform any of the clauses of the contract.

13. The majority opinion is at war with general principles of law.

14. The reasoning of the majority opinion is inconsistent with general principles of law.

15. This Court should grant the writ of certiorari in order to resolve the matter in view of the inconsistency here and above enumerated and because of the divided opinion.

Respectfully submitted,

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APPENDIX I.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

SEPTEMBER TERM, 1958—APRIL SESSION, 1959.

No. 12562

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Plaintiffs-Appellees,
vs.
QUALITY COAL CORPORATION, an Indiana Corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

August 18, 1959.

Before DUFFY, *Chief Judge*, and SCHNACKENBERG and CASTLE, *Circuit Judges*.

CASTLE, *Circuit Judge*. Plaintiffs John L. Lewis, Henry G. Schmidt and Josephine Roche, as Trustees of the United Mine Workers of America[1] Welfare and Retirement Fund, by their second amended complaint, in the district court sought recovery of a money judgment against Quality

1. United Mine Workers of America are herein sometimes called the Union.

Coal Corporation, an Indiana corporation (herein called Quality), defendant, based upon agreements known as The National Bituminous Coal Wage Agreement of 1950 as Amended Effective September 1, 1955 as Amended Effective October 1, 1956, herein referred to as the 1950 agreement, or the agreement.

Quality answered, denying *inter alia* that it owed any money, and averring that said agreement was invalid.

Plaintiffs and Quality each filed a motion for summary judgment. In opposition to plaintiffs' motion and in support of its own motion, Quality attached 10 affidavits.

The district court found that "there is no genuine issue of fact to be submitted to the trial court as to plaintiffs' motion for summary judgment" and thereupon entered judgment accordingly. The district court found, however, that "a question of fact is raised by defendant's motion for summary judgment," and that "defendant is not entitled to judgment as a matter of law"; it thereupon denied Quality's summary judgment motion. By its judgment the district court ordered and decreed that plaintiffs recover of Quality the sum of $84,176.40, with interest and costs. Quality has appealed, seeking our review of the actions of the district court.

Plaintiffs' second amended complaint makes the following material averments:

> Plaintiffs are trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 created by contract dated March 5, 1950.
>
> Quality signed the National Bituminous Coal Wage Agreement effective September 1, 1955, and a similar Agreement effective October 1, 1956, in which it agreed to pay forty cents (40¢) per ton for all coal produced during these periods of time[2] during the dates herein mentioned, Quality produced 210,440.99 tons of coal

2. Between October 1, 1955 and November 30, 1957.

and by virtue of said contracts, it was indebted to the plaintiffs in the sum of $84,176.40.

The record reveals no dispute as to the correctness of the foregoing recital.

Quality denies the validity of the agreement as being contrary to law, and hence says it is not indebted to plaintiffs. Quality contends, on several grounds, that, as a matter of law, the judgment below should be reversed.

1. It contends that plaintiffs cannot sue as trustees, for the reason that no trust has ever arisen or been established as to the money sued for, because no money had ever been transferred or delivered to the alleged Fund. However, the agreement provides:

> "Title to all moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, * * *."

Under this language a trust was created, the corpus of which was any money transferred or delivered by Quality to the trustees for the purposes of the agreement or which Quality became obligated to transfer to the trustees for that purpose. We hold that a trust was created.

2. The agreement sued on provides:

> "* * * It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, *to the extent and in the manner permitted by law* * * *." (Italics supplied.)

Quality contends that this language provides for a closed shop, thus violating 29 U. S. C. A. § 158 (a) (3), which reads:

> "(a) It shall be unfair labor practice for an employer—
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure

> of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this sub-chapter, * * * shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * *."

The provisions of § 158 (a) (3) do not prohibit as unfair labor practice, or invalidate, collective bargaining agreements requiring union membership as a condition of employment provided becoming such a member may be deferred to or after the thirtieth day following the beginning of employment, or effective date of the agreement, whichever is later.

Of course, without the portion italicized above the provisions of the agreement here under consideration would violate § 158. *Lewis* v. *Jackson & Squire*, D. C. 86 F. Supp. 354. It would, without reservation or limitation as to time of joining, require union membership as a condition of employment. But the qualifying phrase "to the extent and in the manner permitted by law" expressly modifies and limits the application of the clause relating to union membership so that any requirement it imposes is conditioned on conformity to existing or future law. The provision of the agreement relating to union membership is thus limited and qualified by its expressed terms so that it imposes no requirement as a condition of employment which would conflict with 29 U. S. C. A. § 158 (a) (3) or any other law.

Lewis v. *Fentress Coal & Coke Co.*, 160 F. Supp. 221 (affirmed, 264 F. 2d 134), involved the same contract now before us. It was held that the union membership provision did not violate a Tennessee statute prohibiting contracts making union membership a condition of employment nor

violate 29 U. S. C. A. Sec. 158 (a) (3). The District Court referred to the language "to the extent and in the manner permitted by law" as a "savings clause". We are dubious as to whether such description was apt. The language employed is not couched in the form usually employed in a so-called "savings clause." It is language which serves to restrict and modify the words of the same sentence in which it is employed and relates to that subject matter alone. Here the meaning and intent of the contractual provision involved is fully expressed in one sentence. No general requirement is imposed, limitations on which, must be searched for in some other separate provision or clause of the contract. The qualified condition imposed is expressed as one complete provision. Its application is not to be measured by some standard found elsewhere in the contract. We agree, however, with the view expressed by the District Court in *Fentress* that the phrase in question is "clear and unequivocal".

We further agree with *Fentress* that cases such as *N. L. R. B.* v. *Gottfried Baking Co.*, 2 Cir., 210 F. 2d 772; *N. L. R. B.* v. *Gaynor News Co.*, 2 Cir., 197 F. 2d 719 and *Red Star Express Line of Auburn* v. *N. L. R. B.*, 2 Cir., 196 F. 2d 78 are distinguishable. In *Gottfried* the agreement contained a union security provision which on its face and by its very terms was illegal. The court found that a separate "savings clause" was "too lacking in specificity" to prevent the preferential hiring provision from constituting an unfair labor practice. *Gaynor* involved a contract containing a union security provision also by its terms illegal. The court found that a general savings clause "which only postponed" the issue of the legality of the closed shop provision for future determination by some proper tribunal did not prevent the provision from being a violation of law. In *Red Star Express Lines* the union security provision was concededly illegal under the Taft-Hartley Act.

The parties to the contract by letter agreed upon an addendum which, because of its vague language, the court found did not have the effect of preventing the security provision from being a violation of the Act.

In the instant case validity of the union membership provision is not dependent upon some vague or indefinite savings clause. Its validity is assured and protected by the very language in which the condition of union membership is stated. This is not the case of a provision illegal by its terms which must be sustained, if at all, by resort to some independent general savings clause. It is a case where the provision is qualified by its own terms so that it meets the test of legality. We conclude that the union membership provision in question does not violate 29 U. S. C. A. § 158 (a) (3).

The validity of the agreement is not affected by any conduct or practice of the parties which would constitute an unfair labor practice under 29 U. S. C. A. § 158 (a) (3). At most, such conduct or practice, not authorized by the agreement itself, would show that the Union and Quality violated applicable law. It would not alter or change the terms of the agreement. *Lewis v. Fentress*, 160 F. Supp. 221 (227).

3. Quality further contends the agreement is void because of duress. It relies, in this respect, on allegations of its Answer that because of concerted activities and threats by the union it extended the agreement in order to avoid strikes and work stoppages, and on the affidavit of its president that he executed the agreement against his free will and that of the corporation. In *American Brake Shoe Co. v. N. L. R. B.*, 244 F. 2d 489, we recognized that the right to engage in a lawful strike is a protected concerted activity. The threat to cause a legal strike and its attendant work stoppage does not of itself constitute duress. And

mere inequality in economic bargaining power is not legal unfairness which will permit either party to avoid a contract. *Birmingham* v. *Bartels*, 157 F. 2d 295. We find no merit in Quality's claim of invalidity of the agreement because of duress.

4. Quality's contention that the agreement is unenforceable because of lack of mutuality likewise lacks substance. A collective bargaining agreement, such as the one containing the Welfare and Retirement Trust Fund provisions herein involved, is as against the employer, a "contract". Corbin on Contracts (1951), Vol. 6, Sec. 1420, Pg. 621. Collective bargaining contracts are enforceable against the employer. *Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437 (461).

5. The contention that indispensable parties are lacking is fully answered by our decision in *Lewis* v. *Quality Coal Corp.*, 243 F. 2d 770-(772) *cf. United States* v. *Carter*, 353 U. S. 210 (220); *U. S. v. Embassy Restaurant*, 358 U. S. 811.

The judgment of the District Court is therefore

AFFIRMED.

APPENDIX I-A.

Dissenting Opinion of Circuit Judge Schnackenberg.

No. 12562.

SCHNACKENBERG, *Circuit Judge*, dissenting.

I must dissent, I believe we are required by the Labor Management Relations Act, 1947, 29 U.S.C.A. § 141 *et seq.*, to hold this agreement unlawful, and that the defense of illegality is good. It is admitted that sec. 158 (a) (3) of said Act forbids a closed shop agreement. The agreement upon which plaintiffs sue provides:

> "* * * It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law. * * *"

Moreover, admitted facts[1] in the record show that in the operation under the agreement at Quality's mines a closed shop has been rigorously maintained.

Faced with the defense of illegality, plaintiffs seek refuge in what they call a "savings clause" reading: "to the extent and in the manner permitted by law". Here is a group of vague words which may have been fashioned to accommodate a general form of contract to the diverse labor

1. An employee when hired had to join the Union by the morning of the third day or get fired, and, if a nonunion employee refused to join, then the union employees would refuse to work on instructions from the Union.

The constitution of the Union states simply:—

> "That all members of the organization shall refuse to work in and around a mine where a man or men work that does not belong to the Union."

No new employees were permitted to work for Quality more than three days (not thirty days) if they did not join the Union.

laws of various states, *i.e.*, *Lewis* v. *Fentress C. & C. Co.*, 160 F. Supp. 221, 227. Certainly the language of sec. 158 (a) (3) of the *federal* act does not "permit" a closed shop to *any extent* or in *any manner*, and no one argues that it does. Hence, the words of the "savings clause" exclude their applicability to the prohibition of sec. 158 (a) (3) of the federal act. Moreover, the meaning of this ambiguous language is settled for the purposes of this case by the interpretation which the Union and Quality have, in performance, placed upon it. By their strict maintenance of a closed shop, they have realistically interpreted it as "saving" the closed shop, the federal act to the contrary notwithstanding. Of course, in a court of law, where a federal act and a private contract conflict, the contract must fall. It becomes wholly unenforcible, especially where, as here, it contains a provision to the effect that all parts are dependent on each other.[2] The effect of this very provision was emphasized by Judge, now Justice, Stewart, in *Lewis* v. *Benedict Coal Corp.*, 259 F. 2d 346, 354.

Moreover, the agreement before us lacks a separability clause, such as appeared in the contract in the *Rockaway* case (*N. L. R. B.* v. *Rockaway News Supply Co.*, 345 U. S. 71, 78) unjustifiably relied on by plaintiffs here.

The term "saving clause" is well known to legislative draughtsmen. It is used to save pending matters from the effect of amendatory or repealing legislation. 82 C. J. S. 1014. In its unique application to this case, however, its venerable purpose is perverted and it is being used to breathe life into a private contract which admittedly, but for the saving clause, contains a provision violating an act of Congress. This contract is now sanctioned by this court. As far as this case is concerned, by judicial decision

2. INTEGRATED INSTRUMENT—This Agreement is an integrated instrument and its respective provisions are interdependent • • •.

a part of a federal act has in effect been repealed. The act was not saved; a contractual provision in violation of the act is saved.

The majority opinion would rely upon the possibility of a union shop being permissible under the agreement before us. The term union shop is used to indicate the situation where the employer is permitted to employ non-union workers, but such workers are required to join the union as a requisite to continuing work. 90 C. J. S. 1044. The right to make an agreement for a union shop is recognized by a proviso in § 158 (a) (3) of the federal Act:

> "* * * That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer *from making an agreement* with a labor organization * * * to require as a condition of employment membership therein *on or after the thirtieth day* following the beginning of such employment or the effective date of such agreement, whichever is the later, * * *." (Italics supplied.)

However, there is no contention by anyone in the case at bar that the Union and Quality ever made an *agreement* for a union shop, which is necessary under the foregoing proviso, and as recognized by analogy in the recent case of *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225, 231, 232, construing 45 U. S. C. A. § 152, Eleventh (a). No agreement for a union shop was made. An act of congress does not create an agreement. No union shop agreement exists in this case. There is only an invalid closed shop agreement, and the parties, by their conduct, have shown that that is the only agreement which they recognize.

I agree with the reasoning of the Second Circuit, in *N. L. R. B.* v. *Gottfried Baking Co.*, 210 F. 2d 772, at 779:

> "The preferential hiring clause contained in the three contracts above-described was clearly illegal as it excludes new applicants at the threshold if they are not members of the Union in good standing, and de-

prives them of the thirty-day grace period within which they might become members after being hired. We think that the mere execution of a contract containing such a provision, even apart from its actual enforcement, constitutes 'discrimination in regard to hire' on the part of an employer and hence falls squarely within the prohibition of Section 8 (a) (3). For, as this Court, in so holding, stated in *Red Star Express Lines* v. *N. L. R. B.*, 196 F. 2d 78, 81, 'the existence of such an agreement without more tends to encourage membership in a labor organization. The individual employee is forced to risk discharge if he defies the contract by refusing to become a member of the union.' See also *N. L. R. B.* v. *Childs Co.*, 2 Cir., 195 F. 2d 617. Since the Union joined in the execution of the contracts containing these illegal provisions and assisted in enforcing them, it follows that the Union 'cause [d] * * * an employer to discriminate against an employee in violation of [Section 8] (a) (3)', thus violating Section 8 (b) (2). *N. L. R. B.* v. *National Maritime Union of America*, 2 Cir. 175 F. 2d 686, certiorari denied 338 U. S. 954, 70 S. Ct. 492, 94 L. Ed. 589.

"Nor is it of consequence, as the respondents contend, that each of the contracts contained a 'saving clause,' the intended effect of which was to salvage as much union security as possible should the preferential hiring provisions be invalidated. The inclusion of this vague 'saving clause' in each contract does not purge the preferential hiring provisions of their illegal effect. *Red Star Express Lines* v. *N. L. R. B., supra; N. L. R. B.* v. *Gaynor News Co.*, 2 Cir., 197 F. 2d 719, certiorari granted 345 U. S. 902, 73 S. Ct. 640, 97 L. Ed. 1339, re-argument ordered 345 U. S. 962, 73 S. Ct. 947, 97 L. Ed. 1382, affirmed by Supreme Court on February 1, 1954."[3]

To the same effect is the recent case of *N. L. R. B.* v. *Broderick Wood Prod. Co.*, 261 F. 2d 548, 557, 10 Cir.

I would reverse.

3. See *Radio Officers'* v. *N. L. R. B.*, 347 U. S. 17, 44, 45, 46, 51, 52.

APPENDIX II.

UNITED STATES COURT OF APPEALS
for the Seventh Circuit.
Chicago, Illinois.

Tuesday August 18, 1959.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Latham Castle, Circuit Judge.

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Plaintiffs-Appellees,
vs.
QUALITY COAL CORPORATION, an Indiana Corporation,
Defendant-Appellant.

No. 12562

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of said District Court in this cause appealed from be, and the same is hereby, Affirmed, with Costs and Interest in Accordance with the Opinion of This Court Filed This Day.

APPENDIX III.

UNITED STATES COURT OF APPEALS
for the Seventh Circuit.
Chicago 10, Illinois.

Thursday, September 24, 1959.

Before:

Hon. F. Ryan Duffy, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Latham Castle, Circuit Judge.

JOHN L. LEWIS, et al., *Plaintiffs-Appellees*, vs. QUALITY COAL CORPORATION, *Defendant-Appellant*.	Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.
No. 12562	

It is ordered by the Court that appellant's petition for a rehearing in the above entitled cause be, and the same is hereby, Denied.

(Schnackenberg, C. J. voted to grant a rehearing.)

APPENDIX IV.

UNITED STATES COURT OF APPEALS
for the Seventh Circuit.
Chicago 10, Illinois.

Tuesday, October 20, 1959.

Before:

Hon. Latham Castle, Circuit Judge.

JOHN L. LEWIS, et al., *Plaintiffs-Appellees.*	Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.
No. 12562 *vs.*	
QUALITY COAL CORPORATION, *Defendant-Appellant.*	

On consideration of the motion of counsel for defendant-appellant for an additional stay of the issuance of the mandate of this Court.

It Is Hereby Ordered that the issuance of the mandate of this Court be further stayed to and including November 13, 1959.

APPENDIX V.

This Statute, 29 U. S. C. A. 158, reads:

"It shall be an unfair labor practice for an employer
• • •

8 (A)(1) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7.

8 (A)(2) • • •

8 (A)(3) By discrimination in regard to hire or tenure of employment or any term or condition to encourage or discharge membership in any labor organization; Provided, that nothing in this sub-chapter, or in any other statute of the U. S. shall preclude an employer from making an agreement with labor organization to require as a condition of employment membership therein on or after the 30th day following the beginning of such employment, or the effective date of such agreement, which ever is the latter."

29 U. S. C. A., Section 158 (b)

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;
• • •

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initia-

tion fees uniformly required as a condition of acquiring or retaining membership; * * *"

29 USCA 157. RIGHTS OF EMPLOYEES. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3), 158, (a)(3) of this title.

Petitioner's Affidavits.

1. Affidavit of Carl F. Kumpf at record page 100, reads as follows:

"'AFFIDAVIT OF CARL F. KUMPF.

"'Carl F. Kumpf being duly sworn on his oath says:

"That he is President of the Quality Coal Corporation, defendant in said cause. That he has been in the coal industry for many years.

"That if an employee is not a member of the United Mine Workers of America, when hired, said employee has until the morning of the 3rd day to belong to union or quit or get fired.

"That if an employee is a member of another district or local union, when hired he has until the morning of the 3rd day in which to transfer to local 7365, and pay up his dues.

"If non union employee refuses to join said union, then the defendants' union employees would refuse to work on instructions of the District or local union.

"That Article Nine, Section Two, of the Constitution of the United Mine Workers of America is:

'That all members of the organization shall refuse to work in and around a mine where a man or men work that does not belong to the Union.'

"That had he failed and refused to sign the agreements alleged in the 2nd amended complaint, the employees would be compelled to stop work under penalty of fine and suspension from the Union."

2. Affidavit of John Gettle at record pages 105, 106 reads as follows:

"John Gettle being duly sworn upon his oath deposes and says; it has been the rule in District #8 and our Local Union #7365 of the United Mine Workers of America, that when the mine owner or operator hires a new man and puts him to work and this new man is not a member of the United Mine Workers of America, he is required to sign an application for membership which in turn authorizes initiation and dues to be checked off his wages.

"This application to be signed on the morning of the third day or the third start. If this is not complied with, the members of Local Union #7365 would be bound by the Constitution of the United Mine Workers of America District #8 adopted at Brazil, Indiana, effective December 1, 1956 under Article Nine, Section Two.

'That all Members of the organization shall refuse to work in and around a mine where a man or men work that does not belong to the union'."

3. Affidavit of Fred Lister at record page 106, is:

"Fred Lister being duly sworn upon his oath deposes and says; it has been the rule in District #8 and our Local Union #7365 of the United Mine Workers of America, that when the mine owner or operator hires a new man and puts him to work and this new man is not a member of the United Mine Workers of America, he is required to sign an application for membership which in turn authorizes initiation and dues to be checked off his wages.

"This application to be signed on the morning of the third day or the third start. If this is not complied with the members of Local Union #7365 would be bound by the Constitution of the United Mine

Workers of America District #8 adopted at Brazil, Indiana, effective December 1, 1956 under Article Nine, Section Two.

'That all Members of the organization shall refuse to work in and around a mine where a man or men work that does not belong to the union'."

4. Affidavit of Clayton Weaver at record page 107, is:

"Clayton Weaver being duly sworn upon his oath deposes and says; it has been the rule in District #8 and our Local Union #7365 of the United Mine Workers of America, that when the mine owner or operator hires a new man and puts him to work and this new man is not a member of the United Mine Workers of America, he is required to sign an application for membership which in turn authorizes initiation and dues to be checked off his wages.

"This application to be signed on the morning of the third day or the third start. If this is not complied with, the members of Local Union #7365 would be bound by the Constitution of the United Mine Workers of America District #8 adopted at Brazil, Indiana, effective December 1, 1956 under Article Nine, Section Two.

'That all Members of the organization shall refuse to work in and around a mine where a man or men work that does not belong to the union'."

Respondent's Exhibits and Affidavits.

165 Exhibit A.

National Bituminous Coal Wage Agreement of 1950 as Amended Effective September 1, 1955.

* * * * *

Now, Therefore, This Agreement, effective September 1, 1955, by and between the coal operators, associations, companies and individuals signatory hereto and by and between such other and additional associations, companies

and individuals as may hereafter become signatory hereto (hereinafter referred to as "Operators"), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as "Mine Workers") on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952", the "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided, such amendments, modifications and supplements being as follows, to wit:

Wages and Hours.

. . . . .

166 Vacation Payment.

. . . . .

Termination of Agreement.

. . . . .

167 Exhibit B.

National Bituminous Coal Wage Agreement of 1950 as Amended Effective October 1, 1956.

. . . . .

Now, Therefore, This Agreement effective October 1, 1956, by and between the coal operators, associations, companies and individuals signatory hereto and by and between such other and additional associations, companies and individuals as may hereafter become signatory hereto (hereinafter referred to as "Operators"), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as "Mine

Workers") on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952", the "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided, such amendments, modifications and supplements being as follows, to wit:

Wages and Hours.

* * * * *

168 Vacation Payment.

* * * * *

Termination of Agreement.

* * * * *

169 Exhibit C.

National Bituminous Coal Wage Agreement of 1950
Effective March 5, 1950, to June 30, 1952.

Executed at Washington, D. C., March 5, 1950.

This Agreement, made this 5th day of March, 1950, by and between the coal operators and associations signatory hereto * * *. This Agreement (subject * * *), carries forward and preserves the terms and conditions of * * * the National Bituminous Coal Wage Agreement * * * as they existed on March 31, 1946 * * *.

Witnesseth: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties, as defined and set forth in this Agreement. It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the employees of the parties of the first part. It is further

agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, to the extent and in the matter permitted by law. • • •

It is agreed that this Fund is an irrevocable trust created pursuant to Section 302(c) of the "Labor-Management Relations Act, 1947," • • •

Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust. • • •

• • • • •

It is stipulated and agreed by the contracting parties hereto that an annual audit of the Fund hereinabove
171 described shall be made by competent authorities to be designated by the Trustees of said Fund. A statement of the results of such audit shall be made available for inspection of interested persons at the principal office of the Trust Fund and at such other places as may be designated by the Trustees.

Failure of any Operator signatory hereto to make full and prompt payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" in the manner and on the dates herein provided shall, at the option of the United Mine Workers of America, be deemed a violation of this Agreement. • • •

• • • • •

B. It is hereby stipulated and agreed by the contracting parties with respect to the Fund created by the National Bituminous Coal Wage Agreement of 1947:

• • • • •

(2) The Operators signatory hereto hereby renounce and forever release any and all claim to or interest in payments made into the said 1947 fund.

• • • • •

(4) The parties hereto agree that the best interest of the beneficiaries of said trust fund would be served by having all unexpended or unobligated funds therein transferred as above provided, and agree that the Trustees thereof should transfer such funds to the new trust fund created by this Agreement.

• • • • •

172 Integrated Instrument.

This Agreement is an integrated instrument and its respective provisions are interdependent and shall be effective from and after March 5, 1950.

• • • • •

177 Exhibit E.

UNITED STATES DISTRICT COURT.

• • (Caption TH-58-C-1) • •

AFFIDAVIT OF JOSEPHINE ROCHE.

District of Columbia, City of Washington. } ss.

Josephine Roche, of 907 Fifteenth Street, N. W., in Washington of the District of Columbia, being sworn upon her oath deposes and says:

1. That she is one of the Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 and is also Director of said Fund; and that the deponent is duly authorized by the Trustees of said Fund to make this Affidavit.

2. That she is a citizen of the State of Colorado.

3. That John L. Lewis is also one of the Trustees of the United Mine Workers of America Welfare and Retire-

ment Fund of 1950; and that he is a citizen of the State of Illinois.

4. That Henry G. Schmidt is also one of the Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950; and that he is a citizen of the State of Ohio.

178 5. That Charles A. Owen, appointed by the National Bituminous Coal Wage Agreement of 1950 as Trustee of the United Mine Workers of America Welfare and Retirement Fund of 1950, died on July 20, 1957, and pursuant to the terms of the trust instrument contained in that agreement and the amendments thereto, Henry G. Schmidt was nominated to succeed the deceased Charles A. Owen and was duly qualified on April 28, 1958.

Josephine Roche,
Director & Trustee, United Mine Workers of America Welfare and Retirement Fund of 1950.

Subscribed and sworn to this 28th day of August, 1958, as witness my hand and seal.

Sara E. Carey,
Notary Public.

(Seal)

My Commission expires April 14, 1961.

274 Exhibit G.

Constitution of the International Union, United Mine Workers of America, Washington, D. C.

Effective November 1, 1956.

Adopted at Cincinnati, Ohio October 8, 1956.

* * * * *

Article VI.

Local Unions.

Section 1. Local Unions may adopt such laws for their government as do not conflict with the laws or rulings of the International, * * *

* * * * *

Article XIV.

Local Unions, How Formed and Governed.

* * * * *

Sec. 9. Any member going to work in a non-union mine shall forfeit his membership and can be reinstated * * *

* * * * *

277 Exhibit H-1.

United Mine Workers of America.

John Owens, Secretary-Treasurer Tel. MEtropolitan 8-0.

United Mine Workers' Building,

Washington 5, D. C.

October 24, 1951

"To All Members, Committeemen and Officers of All Local Union, United Mine Workers of America

Dear Sirs and Brothers:

* * * * *

278 On the basis of the foregoing conclusions, the * * * Board, by unanimous vote, urges all members, local union officers * * * to not only refrain from participation in these unauthorized strikes, but to use their efforts and influence to prevent occurrence of said unauthorized strikes in contravention of the International Constitution * * *.

* * * * * *

279 Exhibit H-2.

United Mine Workers of America.

John Owens, Secretary-Treasurer Tel. MEtropolitan 8-0530

United Mine Workers' Building,

Washington 5, D. C.

May 17, 1956

To the Officers and Members of the United Mine Workers of America:

Declaration of Policy.

Local work stoppage involving a mine in whole or in part not officially authorized by the United Mine Workers of America, were prohibited by order dated October 24, 1951.

* * * * * *

The Executive Board further advises as follows:

* * * * * *

2. Local unions failing to do so, and resorting to local stoppages, will be subject to discipline and penalties. * * *

3. Local unions engaged in unwarranted local stoppages * * * will suffer double penalties.

* * * * * *

Done this 17th day of May, 1956 by the International Executive Board, United Mine Workers of America, Washington, D. C.

Attest:

John Owens,

(Seal) *Secretary-Treasurer.*

Respondent's Affidavit of Wilbert Killion.

280 Exhibit I.

IN THE UNITED STATES DISTRICT COURT.

* * * (Caption—TH-58-C-1) * * *

AFFIDAVITS OF WILBERT KILLION IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS AND IN THE ALTERNATIVE IN SUPPORT OF THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

City of Washington, District of Columbia. } ss:

Wilbert Killion, of Brazil, Indiana, first being duly sworn, upon his oath deposes and says:

1. That he is a member of the United Mine Workers of America International Executive Board, representing District 8, United Mine Workers of America, and has been such representative since April, 1957.

* * * * *

4. That he was employed as a coal miner in mines operating in District 8, United Mine Workers of America, from November, 1945, to March, 1957.

* * * * *

281 7. That the statements contained in the affidavits of Carl F. Kumpf to the effect that "if an employee is not a member of the United Mine Workers of America, when hired, said employee has until the morning of the third day to belong to union or quit or get fired"; "if an employee is a member of another district or local union, when hired he has until the morning of the third day in which to transfer to Local 7365, and pay up his dues"; and

"If non-union employee refuses to join said union, then defendants' union employees would refuse to work on instructions of the District or local union", are not requirements of the United Mine Workers of America, or District 8, United Mine Workers of America, or of the National Bituminous Coal Wage Agreement of 1950 and the amendments thereto. Further, to the best knowledge and belief of the affiant, no officer of the United Mine Workers of America or District 8, United Mine Workers of America, has authorized or did, in fact, prescribe or enforce the requirements as stated above and contained in the affidavits of Carl F. Kumpf.

282 9. That during the period subsequent to March 5, 1950, the affiant is informed that the following employees worked in and around the mines of the Quality Coal Corporation, who were not members of the United Mine Workers of America, for the periods indicated:

a. Cletis Cornwell was employed by the Quality Coal Corporation on or about July, 1949, and joined the United Mine Workers of America September 8, 1955.

b. Boyce Downey was employed by the Quality Coal Corporation on or about October 15, 1952, and worked until February 15, 1955, without joining the United Mine Workers of America. He was laid off from February, 1955, until June, 1955, and joined the United Mine Workers of America, July 11, 1955.

c. Jesse V. Irvin was employed by the Quality Coal Corporation on or about August, 1957, and joined the United Mine Workers of America in January, 1958.

d. William Wheeler worked in and around the Quality Coal Corporation property on a part-time basis for

approximately six months and last worked in October 1957. Mr. Wheeler has never joined the United Mine Workers of America.

The above is not intended to be a complete list of men employed by Quality Coal Corp. who did not join the United Mine Workers of Am. immediately after employment; however, the affiant is without sufficient knowledge and information to state whether there are additional men in this category who were employed by Quality Coal Corp. after March 5, 1950.

Wilbert Killion.

Petitioner's Affidavits in Rebuttal to Respondent's exhibits and Affidavit of Wilbert Killion are:

312 Exhibit G.

IN THE UNITED STATES DISTRICT COURT.

(Caption—TH-58-C-1)

AFFIDAVIT OF ARTHUR KUMPF IN REBUTTAL TO THE AFFIDAVIT OF WILBERT KILLION AND IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

State of Indiana, }
County of Clay. }

Arthur Kumpf first being duly sworn upon his oath deposes and says:

2. Affiant further says that in the summer of 1952, one Frank Butler a local trucker was hired by the Quality Coal Corporation to transport coal from the Price pit to the truck tipple located near Carbon, Indiana. That said

affiant was employed by the Quality Coal Corporation as a dragline operator and was present when said Butler was informed by the coal loading shovel operator that he, Butler would have to join the union or they would not load his truck with coal when he returned. That the said Butler did not return to his job.

Affiant further states that when a non-union miner is employed at said corporation, that it had been the policy, practice and rule since 1949 for said non-union employees to join the union on the morning of the 3rd day of employment or quit. That if said non-union employee failed to join the union, the union employees would refuse to work, forcing the mine to close.

Affiant further sayeth not.

Arthur Kumpf.

• • • • •

314 Exhibit H.

In the United States District Court.

• • (Caption—TH-58-C-1) • •

AFFIDAVIT OF JACK LYNCH IN REBUTTAL TO THE AFFIDAVIT OF WILBERT KILLION AND IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

State of Indiana, }
County of Clay. }

Jack Lynch being first duly sworn upon his oath deposes and says:

• • • • •

2. That Jesse V. Irwin worked for the R & L Trucking Inc. in August 1957 as an operator of drag lines and trucks

and was never employed up to that time by the Quality Coal Corporation. That said Irwin while still employed by R & L Trucking, Inc. drove a truck in the Quality Coal Corporation pit for the first time on September 20, 1957, that one day and another day on October 8, 1957. That said Irwin applied for membership in United Mine Workers of America in December, 1957, after being employed in defendant's coal pit as truck driver. His first check-off of initiation fee of $10.00 and one month dues of $4.75 checked off in January of 1958 for dues of December, 1957.

That William Wheeler mentioned in said affidavit was a part time worker for the R & L Trucking, Inc. in hauling coal from the Quality Coal Corporation. That Mr. Wheeler never did join the United Mine Workers of America as he did not return to work on the 3rd consecutive day.

315 Further more affiant sayeth not.

Jack Lynch.

316 Exhibit I.

IN THE UNITED STATES DISTRICT COURT.

• • (Caption—TH-58-C-1) • •

AFFIDAVIT OF JOSEPH JENKINS IN REBUTTAL TO THE AFFIDAVIT OF WILBERT KILLION AND IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

State of Indiana, }
County of Clay. }

Joseph Jenkins being first duly sworn upon his oath deposes and says:

• • • • •

2. That Jesse V. Irwin worked for the R & L Trucking Inc. in August 1957 as an operator of drag lines and trucks and was never employed up to that time by the Quality Coal Corporation. That said Irwin while still employed by R & L Trucking, Inc. drove a truck in the Quality Coal Corporation pit for the first time on September 20, 1957, that one day and another day on October 8, 1957. That said Irwin applied for membership in United Mine Workers of America in December, 1957, after being employed in defendant's coal pit as truck driver. His first check-off of initiation fee of $10.00 and one month dues of $4.75 checked off in January of 1958 for dues of December, 1957.

That William Wheeler mentioned in said affidavit was a part time worker for the R & L Trucking, Inc. in hauling coal from the Quality Coal Corporation. That Mr. Wheeler never did join the United Mine Workers of America as he did not return to work on the 3rd consecutive day.

3. That affiant further shows that he knows of his
317 own knowledge that if a non-union employee is hired at the Quality Coal Corporation and does not join the union within a reasonable time thereafter, the union miners there employed would refuse to work with said non-union employee and quit work.

Further more affiant sayeth not.

Joseph Jenkins.

318 Exhibit J.

In the United States District Court.

(Caption—TH-58-C-1)

SUPPLEMENTAL AFFIDAVIT OF CARL KUMPF IN REBUTTAL TO THE AFFIDAVIT OF WILBERT KILLION AND IN SUPPORT OF DEFENDANTS MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS MOTION FOR SUMMARY JUDGMENT.

State of Indiana, }
County of Clay. }

Carl Kumpf, being first duly sworn on his oath deposes and says:

2. That this affidavit is made in reply to the affidavit of Wilbert Killion. Attached is copy of letter from UMWA threatening shut down of men in October, 1955.

3. Affiant further states that Cletis Cornwell was an automobile mechanic in the down town garage belonging to the defendant, Quality Coal Corporation which the said defendant purchased in the year 1949. That Cletis Cornwell never worked as a miner at defendants mine nor was he requested to belong to said union but that when he

joined said union, it was voluntary on his part and he still remained an automobile mechanic and never mined any coal.

4. Affiant further says that Boyce Downey mentioned in the said affidavit, worked as a mechanic for the defendant in their garage in down town Brazil, until July 11, 1955, when he quit his employment as a mechanic and secured employment with the defendant as a coal miner and then joined the union as soon as he went to work as a miner for defendant.

Affiant would further show that the Constitution of the United Mine Workers of America, District No. 8, effective December 1, 1956 under Article 10, Section 1 among other things provides:

319 "Any person getting work in or around the mine during the month, it shall be the duty of said person to immediately present a card to the check weighman or mine committee."

Affiant further states that the above quotation from said Constitution compels such a person to join the union and receive a union card immediately for presentation to a representative of said union. That if same is not complied with, all of his union employees would stop working, thereby forcing the mine to close.

Affiant further states that the exhibits attached to the affidavit of John Owens are matters pertaining to the international union and district unions and that he was not informed nor did he have knowledge of such letters and or exhibits mentioned in the Affidavit of John Owens. That he does not have sufficient knowledge or information to form a belief as to the distribution of said exhibits as stated in the Affidavit of John Owens. Affiant further says that he does not have sufficient knowledge or information other than hearsay as to the matters set out in the Affidavit of Josephine Roche and which is marked Exhibit "J." That

upon the advice of his Attorneys he is informed that the said Josephine Roche and her alleged co-trustees are without legal rights to act as Trustees for the reason that no Trustees in law existed. That Trustees could not be created unless there was trust property in existence and said Trust property was delivered to the alleged Trustees.

Affiant further sayeth not.

Carl Kumpf.

Subscribed and sworn to before me this 20th day of October, 1958.

Howard C. Dean,
Notary Public.

(Seal)

My commission expires: May 16, 1962.

320

United Mine Workers of America
District Number 8.
Wilbert Killion, Secretary Treasurer.
Telephone Brazil 2643
Brazil, Indiana.

October 13, 1955

Mr. Carl F. Kumpf, President
Quality Coal Corporation
111 South Forest Avenue
Brazil, Indiana
Dear Sir:

Unless you immediately contact the Welfare and Retirement Fund in order that satisfactory arrangements may be made for the settlement of your delinquent account, our members will be compelled to refrain from work on November 1, 1955, until the company again complies fully with the terms of the joint agreement.

Yours truly,
James Miller,
President, District Eight.

FILE COPY

FILED
DEC 2 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 517

QUALITY COAL CORPORATION, an Indiana Corporation,
Petitioner,

v.

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Counterstatement of Questions Presented	2
Statutes Involved	4
Statement of the Case	4
1. Pleadings, Trial Proceedings and the Seventh Circuit's Judgment	4
2. The Facts; Quality's defenses; and the Seventh Circuit's Conclusions	6
Argument	10
A. There Is Neither Conflict of Decision Nor an Important Question of Federal Law	10
B. The Agreements Are Not Violative of the Act's Section 8(a)(3). The Seventh Circuit Is Clearly Correct In So Holding	11
Cases relied upon by Quality and those cited in the dissenting opinion are readily distinguishable	16
Decisions of the National Labor Relations Board demonstrate the validity of the language under construction	20
C. The Seventh Circuit Correctly Found Quality's Claim of the Agreements' Invalidity Because of Duress to be Without Merit	21
Threats of a strike to obtain a collective bargaining agreement do not constitute duress	21
Even a contract made under duress is not void but only voidable and may be affirmed by the one against whom the duress was allegedly practiced	22
Quality is estopped to assert the Agreements' invalidity on the grounds of duress	23
D. The Seventh Circuit Is Clearly Correct In Rejecting Quality's Contention That the Agreements Are Unenforceable Because of a Lack of Mutuality	24

Page

E. This Court's Decisions Fully Sustain the Seventh Circuit's Conclusion That UMW Is Not An Indispensable Party in the Instant Case 25

F. The Seventh Circuit's Holding That a Trust Was Created Is Clearly Correct 28

Conclusion 30

Appendix I:

Labor-Management Relations Act, 1947:
Section 7 31
Section 8 31
Section 302 32

Appendix II:

National Bituminous Coal Wage Agreement of 1950 34
National Bituminous Coal Wage Agreement of 1952 38
National Bituminous Coal Wage Agreement of 1955 39
National Bituminous Coal Wage Agreement of 1956 40

TABLE OF CASES CITED

American Brake Shoe Co. v. *N.L.R.B.*, 7 Cir., 244 F. 2d 489 22
American Seating Company, 98 NLRB 800 20
American Steel Foundries v. *Tri-City Central Trades Council*, 257 U.S. 184, 209 21
Application of Townsend, 130 N.Y.S. 2d 327, 329 27
Assn. of Westinghouse Salaried Employees v. *Westinghouse Elec. Corp.*, 348 U.S. 437, 440 ..... 24, 28
Birmingham v. *Bartels*, 8 Cir., 157 F. 2d 295 22
Colgate-Palmolive-Peet Co. v. *N.L.R.B.*, 338 U.S. 355, 363 13
Davis v. *Davis*, 197 Ind. 386, 151 N.E. 134, 136 25
E. I. DuPont DeNemours & Co. v. *Claiborne-Reno Co.*, 8 Cir., 64 F. 2d 224, cert. den. 290 U.S. 646 13
Eddy v. *Prudence Bonds Corp.*, 2 Cir., 165 F. 2d 157 .. 13
Fentress Coal & Coke Co., Inc. v. *Lewis*, 6 Cir., 264 F. 2d 134 ..... 10, 12, 16
Gatliff Coal Co. v. *Cox*, 6 Cir., 152 F. 2d 52, 54 24
Gottfried Baking Co., 103 NLRB 227, 228, fn. 6 17
Great Northern R. Co. v. *Delmar Co.*, 283 U.S. 686, 691 13

Page

Harrison v. *Glucose Sugar Refining Co.*, 7 Cir., 116 F. 304, 307-8 (1902) 24

Honolulu Star-Bulletin, Ltd. v. *N.L.R.B.*, D.C. Cir., —— F. 2d ——, decided November 25, 1959 (unreported) 13, 17

Hunt v. *Crumboch*, 325 U.S. 821, 824 .....

International Ladies' Garment Workers Union, AFL v. *Jay-Ann Co., Inc.*, 5 Cir., 228 F. 2d 632 (1956) 28

International Union of United Automobile etc. Workers of America v. *O'Brien*, 339 U.S. 454, 456-7 22

Keller v. *Norfolk & Western Ru. Co.*, 113 W. Va. 286, 292, 167 S.E. 448 24

Kraus v. *Kraus*, 235 Ind. 325, 132 N.E. 2d 608, 610 .. 29

Lewis v. *Benedict Coal Co.*, 6 Cir., 259 F. 2d 346, 354, cert. granted, 359 U.S. 905, 3 L. Ed. 570, S. Ct. No. 18, October Term, 1959 27

Lewis v. *Cable*, 1952, DC, W.D., Pa., 107 F. Supp. 196, 197-8 23

Lewis v. *Fentress Coal and Coke Co., Inc.*, 1958, DC, M.D., Tenn., 160 F. Supp. 221, 227, 228 ..10, 12, 14, 15

Lewis v. *Hixson*, 1959, DC, W.D., Ark., 174 F. Supp. 241 10

Lewis v. *Kerns*, 1959, DC, S.D., Ind., 175 F. Supp. 115 10

Lewis v. *Mearns*, 1958, DC, N.D., W. Va., 168 F. Supp. 134, 137, 139 24

Lewis v. *Quality Coal Corporation*, 7 Cir., 243 F. 2d 769, 770, 772, cert. den. 355 U.S. 882 ..... 9, 26, 27

Lewis v. *Quality Coal Corporation*, 7 Cir., 270 F. 2d 140, 141, 142, 143, 144, 145 .....2, 7, 8, 9, 11, 12, 15, 16, 18, 19, 20, 21, 22, 24, 26, 28

Mearns v. *Lewis*, 4 Cir., 268 F. 2d 427 24

Merritt Oil Corp. v. *Young*, 10 Cir., 43 F. 2d 27, 29-30 29

N.L.R.B. v. *Broderick Wood Products Co.*, 10 Cir., 261 F. 2d 548, 557 19

N.L.R.B. v. *E. F. Shuck Construction Co.*, 9 Cir., 243 F. 2d 519 18

N.L.R.B. v. *United Elec., Radio Etc. Workers of America*, 3 Cir., 203 F. 2d 673, 676 14

N.L.R.B. v. *Gaynor News Co.*, 2 Cir., 197 F. 2d 719 ..16, 18

N.L.R.B. v. *Gottfried Baking Co.*, 2 Cir., 210 F. 2d 772, 777, 780 .....16, 17, 18, 19

N.L.R.B. v. *Local 743, United Brotherhood C. & J.*, 9 Cir., 202 F. 2d 516, 518 19

N.L.R.B. v. *McGraw & Co.*, 6 Cir., 206 F. 2d 635, 639 .. 19

N.L.R.B. v. *Rockaway News Supply Co.*, 345 U.S. 71, 76-9 .....10, 14, 20

Page

Owens-Illinois Glass Company, 96 NLRB 640 20
Ramsdell v. Moore, 153 Ind. 393, 53 N.E. 767 29
Red Star Express Lines of Auburn v. N.L.R.B., 2 Cir., 196 F. 2d 78, 80, 81 ..... 16, 17, 18
Rose v. Owen, 42 Ind. App. 137, 142, 85 N.E. 129 23
Roth v. Local Union No. 1460 of Retail Clerks Union, 216 Ind. 363, 367-8, 24 N.E. 2d 280, 282 22
Schee v. McQuilken, 59 Ind. 269, 278 23
Shipley v. Pittsburgh etc. R. R. Co., 1949, DC, W.D., Pa., 83 F. Supp. 722, 762-3 22
United Marine Division v. Esser Transportation Co., 3 Cir., 216 F. 2d 410, 411, 412 (1954) 26, 27
United States for Benefit and on Behalf of Sherman v. Carter, 353 U.S. 210, 220, 77 S. Ct. 793, 1 L. Ed. 2d 776 ..... 9, 26
United States v. Embassy Restaurant, 359 U.S. 29, 3 L. Ed. 2d 601, 604 ..... 9, 26, 27
United States Rubber Co. v. Moon, 93 Ind. App. 571, 578, 179 N.E. 26, 28, 29 ..... 22, 23
United Steelworkers of America v. Pullman-Standard Car Mfg. Co., 3 Cir., 241 F. 2d 547 (1957) 28
Universal Insurance Co. v. Steinbach, 9 Cir., 170 F. 2d 303, 305 29
Wagner Iron Works, 104 NLRB 445, 489 (1953) 20
Whyte Mfg. Co., 109 NLRB 1125, 1127 13

STATUTES

Labor Management Relations Act, 1947:

Section 7 [29 U.S.C.A. 157] 3, 16, 22
Section 8 [29 U.S.C.A. 158] 3, 16
Section 8(a)(3) [29 U.S.C.A. 158(a)(3)] 2, 6, 8, 10, 11, 12, 14, 16, 18, 19, 20, 21
Section 302 [29 U.S.C.A. 186] 3, 23
Section 302(c)(5) [29 U.S.C.A. 186(c)(5)] 2, 26

MISCELLANEOUS

49 Am. Jur., Specific Performance, Section 34, p. 46 25
Bogert, Trusts and Trustees (1951), Vol. I, Section 112, p. 507 29
Corbin on Contracts (1951), Vol. 6, Section 1420, p. 691 24
Corbin on Contracts (1951), Vol. 6, Section 1470, p. 857 21
Restatement of the Law of Trusts (1935), Vol. I, Section 86(b), p. 245 29
Scott on Trusts, 2d Ed. (1956), Vol. 1, Section 86, pp. 649, 650 29

Supreme Court of the United States

OCTOBER TERM, 1959

No. 517

QUALITY COAL CORPORATION, an Indiana Corporation,
Petitioner,

v.

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court[1] rendered no opinion; its Order and Judgment appear in the Record[2] at pp. 240-1.

[1] United States District Court for the Southern District of Indiana (Terre Haute Division) is referred to as "District Court" or "trial court".

[2] In the petition (abbreviated herein as "P.") filed by Quality Coal Corporation it is stated that the record consists of the "Appendix of Record accompanying and printed together with petitioner's original brief filed in the Court of Appeals" (P. 2). References in this Brief in Opposition are likewise made to said Appendix indicated as "R.". Also filed in this Court is "Appellees' Brief and Appendix" in the Court of Appeals.

The opinion of the Court of Appeals for the Seventh Circuit[3] is reported at 270 F. 2d 140; it appears also as Appendix I in the petition, p. 19; and the dissenting opinion appears as Appendix I-A in the petition, p. 26.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where Trustees of an irrevocable trust created by and continued under national collective bargaining agreements entered into by sundry coal operators and a labor organization pursuant to Section 302 (c)(5) of the Labor-Management Relations Act, 1947, institute an action against one of the operators signatory thereto to recover moneys due to the trust based upon the operator's covenant to pay into the trust a stipulated sum on each ton of coal produced for use or for sale, following the operator's production of 210,440.99 tons of coal under the Agreements, and the operator has otherwise recognized the Agreements, does the Agreements' provision, contained in a single sentence, which is separate and distinct from provisions relating to the trust, that as a condition of employment, all employees covered thereby shall be or become members of the union "to the extent and in the manner permitted by law" so violate Section 8 (a)(3) of said Act as to foreclose recovery by the Trustees?

2. Whether threats of a strike to obtain a coal operator's execution of collective bargaining agreements constitute duress so as to render the Agreements void and unenforceable; and even if so, is such defense available where admittedly employees produced

[3] Herein called either "Seventh Circuit" or "Court of Appeals"

210,440.99 tons for the operator under said agreements, the operator had recognized such agreements in other respects, and the operator had not rescinded the agreements within a reasonable time following their execution?

3. Was the operator's obligation, as set forth in Question 1, to pay into the Fund the stipulated sum following production of 240,440.99 tons of coal obviated under the defense that the Agreements lacked mutuality of obligation because they imposed no obligations upon Trustees?

4. Where the trust instrument of said collective bargaining agreements provides that "Title to all moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, is the union signatory to such agreements an indispensable party in an action by Trustees to recover of and from a signatory operator moneys due and owing to it by such operator?

5. Where a welfare and retirement fund is created by a collective bargaining agreement and under trust provisions therein a signatory coal operator-settlor obligates itself to pay into such fund a stipulated sum for each ton of coal produced by it for use or for sale and title to all moneys paid into or due and owing the fund are vested in the fund's trustees, does a trust arise upon the production of coal by the operator-settlor, even though it has not transferred to the fund moneys due and owing it?

STATUTES INVOLVED

The pertinent statutory provisions involved are contained in Sections 7, 8 and 302 of the Labor-Management Relations Act, 1947 (herein called "Act") [29 U.S.C.A. 157, 158 and 186] and are set forth as Appendix I of this brief, p. 31 *et seq.*

STATEMENT OF THE CASE

1. Pleadings, Trial Proceedings and the Seventh Circuit's Judgment

Under the terms of a trust instrument contained in the National Bituminous Coal Wage Agreement of 1950[4] and carried forward in two collective bargaining agreements[5] admittedly executed (R. 48-9, 54-5) by Quality Coal Corporation[6] and the United Mine Workers of America,[7] Quality obligated itself to pay into the United Mine Workers of America Welfare and Retirement Fund[8] forty cents for each ton of coal it produced for use or for sale and agreed in such instrument that:

> "Title to all moneys paid into *and or due and owing said Fund* shall be vested in and remain exclusively in the Trustees of the Fund . . . ."[9]

Quality admitted that it produced 210,440.99 tons[10] between October 1, 1955 and November 30, 1957. It recognized the Agreements during all times material herein by checking off union dues of its employees and

---

[4] Herein called the "1950 Agreement" (Trustees Exhibit C; R. 59-61).

[5] The two Agreements involved are: (1) The National Bituminous Coal Wage Agreement of 1950 as Amended *Effective September 1, 1955*, [herein called the "1955 Agreement"], and (2) said Agreement of 1950 as Amended *Effective October 1, 1956* [herein called the "1956 Agreement"]. (Trustees' Ex. A and B; R. 57-8) All emphases herein are supplied; unless otherwise indicated.

[6] Herein called "Quality" or "defendant-settlor".

[7] Herein called "UMW".

[8] Herein called "Fund".

[9] The pertinent provisions of the Trust Instrument are set forth herein in Appendix II, pp. 35-37. See also R. 60. All emphases herein are supplied.

[10] R. 49, 51, 55.

remitting them to UMW.[11] The Fund's Trustees,[12] by complaint sought a money judgment in its favor against Quality based upon such production. In its Answer (R. 40-7) Quality asserted its non-liability based upon defenses which are hereinafter discussed. Trustees (R. 56) and Quality (R. 99)[13] each filed a motion for summary judgment and affidavits and exhibits in support of their respective motions and in opposition to each other's motions.

The trial court, noting Trustees' statement (R. 240-1) "that all facts well pleaded in the answer . . . and contained in the affidavits attached to defendant's motion for summary judgment and in opposition to plaintiffs' motion for summary judgment, be accepted as true for the purposes of plaintiffs' motion for summary judgment", found that "there is no genuine issue of fact to be submitted to the trial court as to plaintiffs' motion for summary judgment", sustained Trustees' summary judgment motion and ordered that Trustees recover of Quality $84,176.40, with interest and costs[14] (R. 241).

---

[11] See Quality's answer to Interrogatory No. 12 in "Appellees' Brief and Appendix," p. 44, in the Seventh Circuit and now on file in this Court.

[12] The Fund's Trustees are John L. Lewis, Henry G. Schmidt and Josephine Roche (R. 2, 50, 62). The complaint and amended complaint (herein called "complaint") appears in the Record, pp. 2, 50.

[13] Quality's motion, styled "Motion To Dismiss And For Judgment On The Pleadings" was treated as a summary judgment motion (R. 205).

[14] Finding further that "a question of fact is raised by defendant's motion for summary judgment" and that "defendant is not entitled to judgment as a matter of law" the trial court denied defendant's [Quality's] motion for summary judgment (R. 241).

The Seventh Circuit, on August 18, 1959, affirmed the District Court's judgment[15] and denied Petitioner's rehearing petition (P. 30-1). Quality has filed a petition for a writ of certiorari to the Seventh Circuit's judgment; and the instant brief is filed in opposition to this Court's granting thereof.

2. The Facts:[16] Quality's Defenses; and the Seventh Circuit's Conclusions

Because factual recitals in the Petition are both incomplete and inaccurate, Trustees deem it essential that there be a re-statement of the facts.

The Fund, an irrevocable trust, was created by a trust instrument contained in[17] the 1950 Agreement,

[15] As noted, one Judge dissented upon the *sole* ground that the Agreements did not accord with Section 8(a)(3) of the Act.

[16] The facts, as recorded, result from Quality's admissions in its answer and from affidavits filed both by Trustees and Quality.

In support of their motion for summary judgment, Trustees filed the 1950, 1955 and 1956 Agreements and the affidavit of Trustee Roche (Trustees' Exhibits A, B, C and E; R. 57-62).

Quality then filed its summary judgment motion with supporting affidavits [Quality Exhibits A through F (R. 100-7)]. *Quality's affidavits did not purport to contradict any factual recital contained in the affidavits supporting Trustees' motion.* Instead, they were offered by Quality solely in support of its legal defenses of duress and of compulsory union membership allegedly invalidating the Agreements and in opposition to Trustees' motion.

Trustees then filed additional affidavits [Trustees' Exhibits G, H-1, H-2 and I (R. 159-164)]. Quality, in turn, filed rebuttal affidavits [Quality Exhibits G, H, I and J (R. 193-8)].

Contrary to petitioner's assertion that such facts are "admitted and undisputed" (P. 7), the record establishes that, as the District Court's Order and Judgment declared (R. 240-1), Trustees accepted as true "all facts well pleaded in the answer to the complaint and contained in the affidavits attached to defendant's motion for summary judgment" (R. 240-1) *but for the limited purposes* "of plaintiffs' motion for summary judgment" (R. 241).

[17] Contractual provisions which are pertinent to the issues herein are to be found in Appendix II to this brief, p. 34 *et seq.*

(Trustee Ex. C; R. 59) Quality admits it is a signatory to the 1955 and 1956 Agreements which carried forward the trust instrument provisions of the 1950 Agreement (R. 57-8) and obligated Quality to pay into the Fund forty cents[18] per ton on each ton of coal produced by it for use or for sale. The Seventh Circuit found (P. 21; 270 F. 2d 141) that Quality admitted it produced 210,440.99 tons and that plaintiffs in the District Court sued as Trustees of the Fund.

As the Seventh Circuit indicated, Quality denied "the validity of the agreement as being contrary to law" and contended, "on several grounds, that, as a matter of law, the judgment below should be reversed" (P. 21; 270 F. 2d 141-2). The Seventh Circuit rejected each of Quality's asserted defenses, discussion of which follows.

In its petition for certiorari, petitioner urges that the Agreements were illegal "by virtue of petitioner being forced to operate a closed shop" (P. 6) because they contain the provision that (R. 59-60):

> "It is further agreed that as a condition of employment all employees shall be or become members of the United Mine Workers of America, *to the extent and in the manner permitted by law* . . .".

In affidavits filed to oppose Trustees' summary judgment motion, Quality's President Kumpf averred that the United Mine Workers' Constitution provides that members shall refuse to work with non-union workers, while Kumpf and three members of Local Union 7365, UMW, also in affidavits, recite the rule in the Local and "District 8" to be that a new employee is required

[18] An amendment to the 1950 Agreement in 1952 increased the tonnage payment to forty cents (40¢) per ton. See "Appellees' Brief and Appendix", p. 46; also *post*, p. 39.

to sign a membership card and check-off authorization "on the morning of the th. d day or the third start" and failure so to do would require the union members to refuse to work with the non-union worker.[19]

Rejecting Quality's contention that the Agreements' union security provisions violated Section 8(a)(3), the Seventh Circuit concluded "that the union membership provision in question does not violate" said section (P. 24; 270 F. 2d 143). It reasoned that the qualifying phrase "to the extent and in the manner permitted by law", contrary to the dissenting opinion (P. 26; 270 F. 2d 144), did not consist of "vague words" but, to the contrary, was "clear and unequivocal" (P. 24; 270 F. 2d 143) and that "the meaning and intent of the contractual provision involved is fully expressed in one sentence" (P. 23; 270 F. 2d 142). It reasoned that (P. 23; 270 F. 2d 142-3):

> "No general requirement is imposed, limitations on which must be searched for in some other separate provision or clause of the contract. The qualified condition imposed is expressed as one complete provision. Its application is not to be measured by some standard found elsewhere in the contract".

It declared further that the Agreements' validity "is not affected by any conduct or practice of the parties which would constitute an unfair labor practice under" Section 8(a)(3) [P. 24; 270 F. 2d 143]. At most, it stated, "such conduct or practice, *not authorized by the agreement itself*, would show that the Union and Quality violated applicable law" but that "It would not alter or change the terms of the agreement" (P. 24; 270 F. 2d 143).

The Seventh Circuit found no merit in Quality's claim (P. 13) of the Agreements' invalidity because

[19] Quality Exhibits A (R. 100), C (R. 101-5), D, E and F (R. 105-7)

of duress. Noting judicial recognition that the right to engage in a lawful strike is a protected concerted activity, the Seventh Circuit declared that the "threat to cause a legal strike and its attendant work stoppage does not of itself constitute duress" and that "mere inequality in economic bargaining power is not legal unfairness which will permit either party to avoid a contract" (P. 24-5; 270 F. 2d 143).

It rejected Quality's contention (P. 14) that the Agreements were unenforceable because of lack of mutuality since such contention "lacks substance" (P. 25; 270 F. 2d 143).

The Seventh Circuit (P. 25; 270 F. 2d 143), rejecting Quality's argument (P. 14) that indispensable parties are lacking, declared that such position "is fully answered by our decision in *Lewis* v. *Quality Coal Corp.*, 243 F. 2d 769, 770, 772", citing this Court's cases of *United States* v. *Carter*, 353 U.S. 210, 220, and *United States* v. *Embassy Restaurant*, 359 U.S. 29, 3 L. Ed. 601.

To Quality's position (P. 15) that no trust was created and that therefore Trustees could not bring the action because no money had ever been transferred or delivered to the Fund, the Seventh Circuit pointed to the Agreements' language that:

> "Title to all moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund. . . ."

and held that thereunder "a trust was created, the corpus of which was any money transferred or delivered by Quality to the trustees for the purposes of the Agreement or which Quality became obligated to transfer to the trustees for that purpose" and, finalizing, the Court of Appeals declared, "We hold that a trust was created" (P. 21; 270 F. 2d 142).

ARGUMENT

A. There Is Neither Conflict of Decision Nor An Important Question of Federal Law

There is no "irreconcilable conflict" of federal courts of appeals' decisions to warrant the Court's granting the writ herein. No contrariety of opinion exists in the various decisions which have considered the precise language which the Seventh Circuit has stamped as valid under the Act's Section 8(a)(3). Its views accord with those expressed in *Lewis* v. *Fentress Coal and Coke Co., Inc.*, 1958, D.C., M.D. Tenn., 160 F. Supp. 221, affirmed by the Sixth Circuit (264 F.2d 134); *Lewis* v. *Hixson Coal Co.*, 1959, D.C., W.D. Ark., 174 F. Supp. 241; and *Lewis* v. *Kerns*, 1959, D.C., S.D. Ind., 175 F. Supp. 115. No court, construing the Agreements' wording, has condemned it as being in violation of Section 8(a)(3). Moreover, it is wholly consonant with this Court's pronouncements in *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71.

Other federal courts have condemned, as violative of the statute noted above, union security clauses *differing entirely from the clause in the instant Agreement*. The Seventh Circuit herein, and the Sixth Circuit in *Fentress*, distinguished Second Circuit cases upon which Quality relies, the reasoning of one of which dissenting Judge Schnackenberg accepted, *although the contractual language was grossly dissimilar from that which the instant case presents.* In each of those and other cases upon which Quality relies the union-security provisions themselves were *per se* violative of Section 8(a)(3) and the legal principle therein enunciated was correlated to and based upon such language. Where, as herein, the union-security provisions, on their face, show an intent to have a clause lawful under the statute by use of the phrase "to the extent and in the manner permitted by law",

the legal principle has no application. Even Quality admits to this Court (P. 6) that the conflict "appears to be one of fact". Further, Quality demonstrates how barren is its argument of invalidity and conflict by its admission (P. 10) of judicial requirement that statutory requisites be read into every collective bargaining agreement.

Except as to the issue of the validity of the union security provisions, neither Quality nor the dissenting opinion contends that the Seventh Circuit's opinion is in anywise at variance with decisions of other federal appellate courts or that any other issue raises an important question of federal law.

Quality has singled out the issue of the validity of the union security provisions as the basis for the award of certiorari; but in view of the factual distinctions herein discussed and the lack of conflicting decisions, no important question of federal law is posed. This is particularly emphasized where, as here, the Court of Appeals' decision on the issue of the validity of the union security provisions, as well as other issues determined by it, is clearly correct. This is fully demonstrated in the discussion which follows:

B. The Agreements Are Not Violative of the Act's Section 8(a)(3). The Seventh Circuit Is Clearly Correct in So Holding

The Seventh Circuit appropriately appraised the words "to the extent and in the manner permitted by law" as a qualifying phrase expressly modifying and limiting the application of the clause relating to union membership and professed that any requirement it imposed "is conditioned on conformity to existing or future law" (P. 22; 270 F. 2d 142). It cogently observed that the phrase "serves to restrict and modify the words of the same sentence in which it is employed

and relates to that subject matter alone" (P. 23; 270 F. 2d 142) and that "the meaning and intent of the contractual provision involved is fully expressed in one sentence" and that "No general requirement is imposed, limitations on which must be searched for in some other separate provision or clause of the contract . . . . Its application is not to be measured by some standard found elsewhere in the contract" (P. 23; 270 F. 2d 142-3).

Disagreeing with the dissenting opinion which characterizes the qualifying phrase as "a group of vague words" (P. 26; 270 F. 2d 144), the Seventh Circuit, consonant with the District Court in *Lewis* v. *Fentress Coal and Coke Company, Inc.*, 1958, D.C., M.D. Tenn., 160 F. Supp. 221, 228, appraised the phrase as "clear and unequivocal" (P. 23; 270 F. 2d 143). The Sixth Circuit, in a Per Curiam opinion in *Fentress Coal & Coke Co., Inc.* v. *Lewis*, 6 Cir., 264 F. 2d 134, "affirmed upon the grounds and for the reasons stated in the opinion of the District Court".[20]

In clear, positive and unequivocal language the Agreements' signatories have denoted their intention to achieve a clause lawful under the Act. The qualifying phrase—as the Seventh Circuit has characterized the words "to the extent and in the manner permitted by law"—could not reasonably be interpreted to connote illegality. To urge upon this Court, as the dissenting opinion and Quality do, that the language is offensive to the Act's Section 8(a)(3) is to trans-

[20] Only a reading of Fentress (160 F. Supp. 211 and 264 F. 2d 134) is required to show how inaccurate and contrary to fact is Quality's argument (P. 11) that *Fentress* "involved none of the questions . . . decided by the majority opinion"; that it decided "matters completely outside . . . issues involved" herein "and completely ignored the undisputed facts in the record"; that Fentress "was made on the proposition . . . there was no" alteration or change in the contract "and brushed off the important matter as to whether or not there was a violation of a closed shop"

mute an expressed intention to do that which is lawful into that which the law *does not* permit. Such a result may be achieved, Trustees submit, only by unreasonable and fatuous reasoning. The interpretative process so used would be at odds with the principle which denounces the right of tribunals to ignore plainly expressed provisions of a contract. *Colgate-Palmolive-Peet Co.* v. *NLRB*, 338 U.S. 355, 363. Rejecting the thesis urged by Quality herein, closed-shop requirements under a union's general laws were recently held not to render the contract illegal *per se* where it expressly read that such union laws "not in conflict with federal . . . law" should govern the parties' contractual relations, the appellate court declaring, "*An erroneous impression of plain terms does not change the meaning of the plain terms.*" Honolulu Star-Bulletin, Ltd. v. NLRB, DC Cir., F. 2d , decided November 25, 1959 (unreported). Further challenge to the dissent is found in the principle that written instruments, even those lending themselves to two constructions, are to be construed as lawful wherever possible. *Graf Northern R. Co.* v. *Delmar Co.*, 283 U.S. 686, 691; *E. I. DuPont De-Nemours & Co.* v. *Claiborne-Reno Co.*, 8 Cir., 64 F. 2d 224, cert. den. 290 U.S. 646; *Eddy* v. *Prudence Bonds Corp.*, 2 Cir., 165 F. 2d 157.[3]

This Court has heretofore swept aside contentions such as Quality and the dissenting jurist would impose upon the language under consideration. In a situation where a collective bargaining agreement expressly stated the parties' belief that "this contract now contains no provision which is contrary to federal or state law or regulation" and the National Labor Relations

[3] The National Labor Relations Board, in construing collective bargaining agreements, has recognized and implemented the legal doctrine thus expressed. *Whatever Mfg. Co.*, 109 NLRB 1125, 1127

Board had held it void upon the theory that it contained an illegal union-security clause, this Court, in *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71, 78, declared:

> "The whole contract shows respect for the law and not defiance of it. The parties, who could not foresee how some of the provisions of the statute would be interpreted, proposed to go as far toward union security as they are allowed to go, and this is their right; and they proposed to go no farther, and that is their whole duty."

Certainly here the Agreements' language shows "respect for the law and not defiance of it" and that the signatories intended "to go as far toward union security as they are allowed to go" and that "they proposed to go no farther".[22]

The Third Circuit, in *NLRB* v. *United Electrical, Radio etc. Workers of America*, 3 Cir., 203 F. 2d 673, 676, construing union-security provisions of a collective bargaining agreement, held that statutory requirements of Section 8(a)(3) "must . . . be read into every such agreement" although they "*need not necessarily be expressly included* on pain of invalidating the union security provision", citing this Court's *Rockaway* case. *Even Quality admits (P. 10) the necessity for reading the law's requirements into the Agreements.* Its ad-

[22] In the *Fontress* case, the District Court, rejecting the claim that the agreement's wording was condemned under Section 8(a)(3), declared that such argument "cannot be accepted in view of the" language "to the extent and in the manner provided by law" and found the problem "to be fully answered, at least in principle" by *Rockaway* (160 F. Supp. 228).

While the dissenting jurist in the instant case regards the *Rockaway* case as "unjustifiably relied on by plaintiffs" (P. 27; 270 F. 2d 144), he does not point to the quotation contained above in the text but says that the "agreement . . . lacks a separability clause such as appeared in the contract in the Rockaway case".

mission dissipates totally its argument that the Agreements' wording is at war with the Act.

Like Quality, the dissenting opinion urges the Agreements' invalidity because, as it asserts, "in the operation under the agreement at Quality's mines a closed shop has been rigorously maintained" (P. 26; 270 F. 2d 144).

A ready answer is found in *Lewis* v. *Fentress Coal & Coke Company* case (160 F. Supp. 227). There the defendant operator argued that "the practice should be looked to as indicating the practical construction of the contract by the parties as requiring a union shop" and the district court observed that that allegation "must be accepted as true for the purpose of disposing of the defendant's contention. But, declared the court,

> "it does not follow that the plaintiffs' motion for summary judgment should be overruled or that a material issue of fact is presented. This is true because *at most the practice, not authorized by the contract itself, would show that the union and the company violated the applicable law. It would not alter or change the terms of the Agreement which . . . provides in effect that neither a closed shop nor a union shop is required by the contract unless it is in conformity with the law . . .*" (160 F. Supp. 227).

The district court refused to regard "the practice as in any wise relevant in determining" the parties' intention as to the contract's meaning because "the contract itself is not ambiguous" (160 F. Supp. 227). Agreeing with the *Fentress* reasoning, the Seventh Circuit's majority declared that:

> "The validity of the agreement is not affected by any conduct or practice of the parties which would constitute an unfair labor practice"

under Section 8(a)(3), but that

> "At most, such conduct or practice, not authorized by the agreement itself, would show that the Union and Quality violated applicable law. It would not alter or change the terms of the agreement." (P. 24; 270 F. 2d 143).

Such reasoning likewise disposes of the dissenting jurist's complaint that the majority opinion partially repeals the Act (P. 27-28) and Quality's argument (P. 10-11) that it nullifies the Act's Section 7, as well as provisions of Section 8.

Cases Relied Upon by Quality and Those Cited in the Dissenting Opinion Are Readily Distinguishable.

Challenging Quality's statement (P. 6) that the instant case "raises important questions of Federal Law wherein various Circuit Courts of Appeal are in irreconcilable conflict with one another", the Seventh Circuit, noting cases from the Second Circuit upon which Quality relies, registered its agreement with the Sixth Circuit's *Fentress* that "cases such as *N.L.R.B.* v. *Gottfried Baking Co.*, 2 Cir., 210 F. 2d 772; *N.L.R.B.* v. *Gaynor News Co.*, 2 Cir., 197 F. 2d 719 and *Red Star Express Lines of Auburn* v. *N.L.R.B.*, 2 Cir., 196 F. 2d 78 *are distinguishable*" (270 F. 2d 143). As noted, condemned clauses differ materially from the Agreements' wording; and Quality admits (P. 6) the conflict "appears to be one of fact".

In *Gottfried* (210 F. 2d 772), the Second Circuit concern was with a preferential hiring clause requiring Gottfried "to hire only members of the Union . . . in good standing". A *separate* paragraph of the contract stated that if "the closed shop is in conflict with the law", then the union shop should prevail, it being the parties' intention "to grant the maximum union

security permitted by law" (p. 777). The National Labor Relations Board (103 NLRB 227, 228, fn. 6) had found that the "savings clause" was "*too lacking in specificity* to prevent the execution or retention of the preferential hiring provisions from constituting an unfair labor practice" (210 F. 2d 780), with which the Second Circuit agreed.

In *Red Star* (196 F. 2d 78), the employer agreed in 1944 to "hire only union men if available but if . . . not available", non-union men could be employed "upon the condition that they become members of the union within twenty-four hours after employment" (p. 80). Renewals continued such agreement until enactment of the Taft Hartley Act, when an addendum to the contract provided that "all clauses that are affected by the law shall be considered null and void" but if "such clauses are declared legal" they "become part of" the Agreement (p. 80). The Second Circuit agreed with the Board that the addendum failed "to specify which, *if any*, clauses were to be suspended" and reasoned that "the parties themselves were unable to determine which parts of the contract were affected by the . . . Act" (p. 81).[22a]

[22a] The District of Columbia Circuit, in the *Honolulu Star-Bulletin* case, uses the following language to distinguish *Red Star* and other cases:

> "We find no merit in the Board's contention that Section 24(c) of this contract is merely a savings clause of the type found ineffectual in Red Star Exp. Lines v. N.L.R.B., 196 F. 2d 78 (2d Cir. 1952), and other cases cited to us. *In Red Star the savings clause was held insufficient to remove the coercive effect upon employees of an explicit (illegal) union-security clause.* The present contract contained no such explicit provision, and Section 24(c) was not a suspension of the operation of any illegal clause but rather an incorporation of certain general laws."

In *Gaynor* (197 F. 2d 719), the contract contained a union security clause. No Board-conducted union shop election had authorized such clause, as the Act then required. The contract provided in another provision that "should . . . any provision . . . be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted". Agreeing with the Board, the Second Circuit opined that the savings clause "was not to defer the application of the union-security provision but only to postpone 'the issue of its legality for future determination by some proper tribunal'." (p. 723).

The Seventh Circuit, differentiating *Gottfried, Red Star* and *Gaynor* from the instant case, appropriately said (P. 24; 270 F. 2d 143):

> "In the instant case validity of the union membership provision is not dependent upon some vague or indefinite savings clause. *Its validity is assured and protected by the very language in which the condition of union membership is stated.* This is not the case of a provision illegal by its terms which must be sustained, if at all, by resort to some independent general savings clause. *It is a case where the provision is qualified by its own terms so that it meets the test of legality.*"

This distinction is likewise applicable to Quality's citation (P. 9) of *N.L.R.B.* v. *E. F. Shuck Construction Co.*, 9 Cir., 243 F. 2d 519. Therein, a savings clause provided that any provision "*'held'* to be invalid under the Act should be deemed inoperative". The Ninth Circuit rejected argument that this language removed the union security provisions' violating Section 8(a)(3) because use of the word "*'held'* indicates that an invalid provision is operative . . . until it is held invalid by the Board or by a court" and further: "the provision is fatally vague because it does not state which provisions are suspended" (p. 521).

The dissenting jurist agreed with the reasoning in *Gottfried* (270 F. 2d 145), the inapplicability of which has already been noted. Quality (P. 12) and the dissent point to *N.L.R.B.* v. *Broderick Wood Products Co.*, 10 Cir., 261 F. 2d 548, 557. In that case, respondents *tacitly admitted* that a preferential hiring clause was "an illegal provision within . . . Section 158(a)(3)", and the defense asserted was that it was not intended that such provisions be a part of the Agreement—a defense which the Ninth Circuit rejected. The inappositeness of *Broderick* is readily apparent.

Quality's additional citations (P. 8-9) of *N.L.R.B.* v. *Local 743, United Brotherhood C. & J.*, 9 Cir., 202 F. 2d 516, 518; and *N.L.R.B.* v. *McGraw & Co.*, 6 Cir., 206 F. 2d 635, 639, are totally dissimilar to the language found in the instant Agreements. In the Ninth Circuit's *Local 743* case, the condemned Agreement required the company to hire only employees belonging to the union or referred by it; while in the Sixth Circuit's *McGraw*,[23] the employer agreed to employ through the union office only members in good standing. Neither of such cases contained any savings or qualifying clauses.

In none of these cases could it have been argued, as Trustees tenably urge herein, that the contract signatories by the contract's language "show respect for the law and not defiance of it" and that thereby they intended "to go as far toward union security as they are allowed to go" and they "proposed to go no farther".

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[23] Even the Sixth Circuit's *McGraw* case militates against assertions in Judge Schnackenberg's dissent and of Quality that the Agreements are "unenforcible" (P. 27) and that the union-security provisions "destroy the entire Agreement" (P. 12). While the Sixth Circuit restrained recognition of the clause which violated Sec. 8(a)(3), no injunction was entered against enforcement of all other provisions of the agreement (206 F. 2d 642).

Decisions of the National Labor Relations Board Demonstrate the Validity of the Language Under Construction.

In *Wagner Iron Works*, 104 NLRB 445 (1953), union membership was contractually required as a condition of continued employment but there was dissipated "any doubt as to the validity of the clause" because of the contract's further containment that membership should be maintained *"to the extent authorized by Section 8(a)(3)"* (104 NLRB 489). Also, the Board held a clause that "This contract is subject in all respects to the provisions of the Labor-Management Relations Act, as it may be amended from time to time, there being no intent in this contract to limit or abridge in any manner the rights and privileges extended by said Act", met the Act's requirements. *America Seating Company*, 98 NLRB 800. See also *Owens-Illinois Glass Company*, 96 NLRB 640.

Both the dissenting opinion (P. 27) and Quality (P. 12) argue that the union security provisions' illegality renders the Agreements "wholly unenforcible". Even if there were merit to such position—which Trustees deny—this Court's *Rockaway* fully dissipates that position. This Court made it plain that Quality's obligation in the instant case would exist by its statement (345 U.S. 76-77, 79):

> ". . . even if inclusion of a forbidden provision is enough to justify the Board in setting it aside as to the future, it does not follow that it can be wholly ignored in judging events that occurred before it was set aside. It is one thing for the Board to say that the parties should not go on under such a contract; it is another to say that no effect whatever may be given to a contract negotiated in good faith by the union and the employer which both believed to be valid and operative, to which both were conforming their conduct, and which no authority had yet held void.
>
> . . .
>
> "The total obliteration of this contract is not in obedience to any command of the statute . . ."

The foregoing discussion abundantly demonstrates that the Seventh Circuit was clearly correct in holding that the union membership provision "does not violate" Section 8(a)(3).

C. The Seventh Circuit Correctly Found Quality's Claim of the Agreements' Invalidity Because of Duress to Be Without Merit

Quality's contention that the Agreements were void because of duress (P. 13-14) was denied by the Seventh Circuit, which found "no merit" therein (P. 24-5; 270 F. 2d 143). Quality's claim is based upon Carl Kumpf's statement that he executed both the 1955 and 1956 Agreement "against his free will and against the free will of the corporation" and that if Quality had refused to sign the Agreements union members working for it would be compelled to stop work under penalty of fine and suspension from the union (R. 101-2).

Trustees submit there was no duress in the Agreements' execution; but even if there had been, Quality subsequently ratified the Agreements and is estopped to deny their validity.

Threats of a Strike to Obtain a Collective Bargaining Agreement Do Not Constitute Duress.

Attainment of a legitimate purpose for which a labor union exists is legal justification for interference with an employer's business. Corbin on Contracts (1951), Vol. 6, Section 1470, p. 857. That a "strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital"[24] is settled law. Decisional law in Indiana, like federal statutory and de-

[24] *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209.

cisional law,[26] sanctions lawful strike activity.[27] The Seventh Circuit noted (P. 24; 270 F. 2d 143) its previous recognition "that the right to engage in a lawful strike is a protected concerted activity", citing *American Brake Shoe Co.* v. *N.L.R.B.*, 7 Cir., 244 F. 2d 489. It aptly stated (P. 24; 270 F. 2d 143) that "The threat to cause a legal strike and its attendant work stoppage does not of itself constitute duress".[28]

Appropriately the Seventh Circuit declared that there was "no merit" in Quality's claim of invalidity of the Agreements because of duress[29] (P. 25; 270 F. 2d 143).

Even a Contract Made Under Duress Is Not Void But Only Voidable and May Be Affirmed by the One Against Whom the Duress Was Allegedly Practiced.

In Indiana a contract made under duress is not void but only voidable and may be ratified and affirmed

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[26] Labor Management Relations Act, 1947, Section 7 [29 U.S.C.A. 157]; *International Union of United Automobile etc. Workers of America* v. *O'Brien*, 339 U. S. 454, 456-7.

[27] *Roth* v. *Local Union No. 1460 of Retail Clerks Union*, 216 Ind. 363, 367-8, 24 N. E. 2d 280, 282.

[28] In *Shipley* v. *Pittsburgh etc. R. R. Co.*, 1949, DC, W.D. Pa., 83 F. Supp. 722, 762-3, the Court said:

"*The threat to cause a legal strike is not duress.*"

See also *United States Rubber Co.* v. *Moon*, 93 Ind. App. 571, 179 N. E. 26, 28, wherein the Indiana court notes that the term "duress" is connotative of conduct "contrary to law".

[29] In its Petition (p. 13), Quality complains of the Seventh Circuit's citation of *Birmingham* v. *Bartels*, 8 Cir., 157 F. 2d 295, directing this Court's attention to the quotation therefrom that duress or fraud had not been "set up" or "attempted to be proved" therein. Trustees submit that this does not in any wise dissipate the soundness of the Seventh Circuit's declaration that:

> "The threat to cause a legal strike and its attendant work stoppage does not of itself constitute duress. And mere inequality in economic bargaining power is not legal unfairness which will permit either party to avoid a contract." (P. 25-5; 270 F. 2d 143).

by the party upon whom the duress was practiced (*Schee* v. *McQuilken*, 59 Ind. 269, 278; *Rose* v. *Owen*, 42 Ind. App. 137, 142, 85 N. E. 129). Such authorities likewise require that election to rescind such a contract be made within a reasonable time.

Quality ratified the Agreements; it failed to rescind them within a reasonable time; it admitted it operated under the Agreements for more than two years, producing 210,440.99 tons of coal; and it checked off union dues and remitted the same to UMW pursuant to the Agreements (ante, pp. 4-5). As the Indiana court stated in *United Rubber Co.* v. *Moon*, 93 Ind. App. 571, 578, 179 N.E. 26, 29:

> "The payments made on the note, of which there were five, *could indicate nothing but ratification* . . ."

Quality Is Estopped to Assert the Agreements' Invalidity on the Grounds of Duress.

Quality willingly accepted the benefits of its employees' coal production. Since Fund benefits are payable only to employees of contributing employers,[29a] Quality's contention, if sustained, would result in its employees being rendered ineligible for benefits, contrary to all concepts of equity and good conscience. Quality's pattern of asserted duress based upon fear of strikes was rejected in *Lewis* v. *Cable*, 1952, D.C., W.D. Pa., 107 F. Supp. 196, 197-8, where it is stated:

> "*Defendant cannot by his acts and declarations pretend to be bound by the Agreement so as to prevent strikes . . . and then, when full liability under said Agreement is asserted, seek to disaffirm it.*"[30]

[29a] See the Act's Section 302 (29 U.S.C.A. 186) which appears in Appendix I hereto, pp. 32-3.

[30] Applicable here is the maxim, *Allegans contraria non est audiendus*. A court has said:

> "And a thousand years before Justinian the attitude of primitive people towards duplicity is well illustrated by the fable

See also *Lewis* v. *Mearns*, 1958, DC, N.D. W. Va., 168 F. Supp. 134, 139, aff'd *Mearns* v. *Lewis*, 4 Cir., 268 F. 2d 427; *Harrison* v. *Glucose Sugar Refining Co.*, 7 Cir., 116 F. 304, 307-8 (1902).

D. The Seventh Circuit Is Clearly Correct in Rejecting Quality's Contention That the Agreements Are Unenforceable Because of a Lack of Mutuality

Quality urges (P. 14) that the Agreements are unenforceable because they lack mutuality of obligation, arguing that no obligation is placed upon Trustees, non-signatories to the Agreements. Such contention, stated the Seventh Circuit, "lacks substance" (P. 25; 270 F. 2d 143). The correctness of the Seventh Circuit's holding is readily apparent.

It is too late in the history of collective bargaining in this country to treat seriously an employer's challenge to the validity of a collective bargaining agreement on the ground of lack of mutuality of obligation. Federal policy, mirrored by numerous federal statutes and federal decisional law, seeking the removal of industrial strife and the encouragement of collective bargaining, militates against the proposal which Quality now urges upon the Court. Collective bargaining agreements, implementing as they do a national labor policy, have long been accorded a secure and stable position in the national economy. Cf. *Gatliff Coal Co.* v. *Cox*, 6 Cir., 152 F. 2d, 52, 54; Corbin on Contracts (1951), Vol. 6, Section 1420, p. 691. Quality overlooks that its obligations thereunder arose only upon employee performance. *Assn. of Westinghouse*

---

of Aesop where the satyr said to the traveller: 'Be off with you! I will have no part with a man who can blow hot (to warm his hands) and cold (to cool his pottage) from the same mouth.'" *Keller* v. *Norfolk & Western Ry. Co.*, 113 W. Va. 286, 292, 167 S. E. 448.

Salaried Employees v. *Westinghouse Elec. Corp.*, 348 U.S. 437, 440. What has been said herein (*ante*, pp. 23-24) about Quality's unconscionable attitude in attempting to avoid the Agreements for reasons of alleged invalidity due to alleged duress is likewise applicable.

Davis v. *Davis*, 197 Ind. 386, 151 N.E. 134, cited by Quality on this issue (P. 14), is without precedent value. In that case it was "not alleged nor . . . claimed that plaintiff did any work or performed any service for defendant on any of the . . . days in question" (151 N. E. 136). In the instant case, Quality's admission of coal production fully sustains the fact that its employees performed services. In 49 Am. Jur., Specific Performance, Section 34, p. 46, it is said, "At law, . . . mutuality of obligation in the sense that there must be an undertaking on one side and a consideration on the other is all that is essential." Certainly, the instant situation meets that test.

E. This Court's Decisions Fully Sustain the Seventh Circuit's Conclusion That UMW Is Not an Indispensable Party in the Instant Case

In the Seventh Circuit, as in its Petition (p. 15), Quality urges UMW to be an indispensable party.[30a]

The Seventh Circuit rejected Quality's contention, declaring it

[30a] Whereas it argues to this Court that UMW as a contract signatory alone could declare, at its option, a violation of the Agreement, which they exercised (P. 15), Quality complained to the Seventh Circuit that "Conditions precedent were not complied with" in that Trustees failed "to allege that" UMW "have exercised their option to deem the alleged failure of payment to the" Fund "a violation of the Agreement" and it argued that, absent UMW's declaration of contract violation, Trustees can enjoy no greater rights than the employees have insisted upon for themselves. See Quality's brief (pp. 32-33) in the Seventh Circuit which is now filed with this Court. Applicable again is the maxim, *Allegans contraria non est audiendus.*

> "is fully answered by our decision in Lewis v. Quality Coal Corp., 7 Cir., 243 F. 2d 769, 770, 772, cf. United States for Benefit and on Behalf of Sherman v. Carter, 353 U. S. 210, 220, 77 S. Ct. 793, 1 L. Ed. 2d 776; United States v. Embassy Restaurant, [359 U.S. 29, 3 L. Ed. 601]." (P.25; 270, F. 2d 144).

That the Seventh Circuit's conclusion is correct is manifest by the following discussion:

Trustees sue to recover royalty on coal produced by defendant-settlor. Quality was one of the settlors of the trust. In the trust instrument, defendant-settlor gave plaintiffs-Trustees a right to collect a royalty of forty cents (40¢) per ton on each ton of coal produced for use or for sale by defendant-settlor, *and vested exclusive title to that right in Trustees.*

There is both legislative support and judicial recognition that in enacting Section 302(c)(5) [29 U.S.C.A. 186(c)(5)] Congress sought to create welfare trust funds which would be free and clear from union control. This legislative support is referred to and quoted in *United Marine Division* v. *Essex Transportation Co.*, 3 Cir., 216 F. 2d 410, 411-12 (1954): Congress made of the Fund an entity separate and apart from either the employer-settlors or the contracting union.

Significantly, every decision in which the instant issue has been decided has been consonant with this Court's profession in the *Carter* case wherein it is said (353 U.S. 220):

> "The master labor agreements not only created Carter's obligation to make the specified contributions, but simultaneously *created the right of the trustees to collect those contributions on behalf of the employees. The trust agreement gave the trustees the exclusive right to enforce payment.*"

and with this Court's declaration in *Embassy* (3 L. Ed. 2d 604) that the

> "obligation is to contribute sums to the trustees, . . . ; it is enforceable only by the trustees who enjoy not only the sole title, but the exclusive management of the funds."

Cf. *United Marine Division* v. *Essex Transportation Co.*, 3 Cir., 216 F. 2d 410, 412 (1954); *Application of Townsend*, 130 N.Y.S. 2d 327, 329. Significantly, Quality directs the Court to no cases[31] which mandate that UMW, as representative of its membership, is an indispensable party in an action brought by Trustees to recover rights under the trust instrument. On the other hand, federal decisions pose the question as to whether UMW is a proper party in such an action.[32]

[31] Quality's citation of and quotation from *Lewis* v. *Benedict Coal Co.*, 6 Cir., 259 F. 2d 346, 354, (P. 15) are totally abortive. That case (No. 18, October Term, 1959), now before this Court for decision, involves the issue of a counter action against UMW by the coal company. There is no question therein of UMW as an indispensable party.

[32] Quality complains (P. 14) of the majority opinion's declaration that the instant issue was answered in the first *Quality* case (243 F. 2d 770, 772). Quality, in the Seventh Circuit, asserted, as it does now, that the issue was not raised in the *first Quality* case. To such assertion Trustees pointed out to the Seventh Circuit that "a comparision of the brief in the first *Quality* case filed . . . on Quality's behalf with its brief filed herein discloses that Quality's counsel hav lifted verbatim several pages of the first brief and incorporated them in their brief in the current case". See Appellees' Brief and Appendix, p. 33, which was filed by Petitioner with this Court. No dispute thereof was made in the Seventh Circuit by Quality.

Further, Quality complains of the necessity of UMW as a party litigant "so that if there were any defenses by reason of illegal strikes, etc., they could have been raised as was done in the Benedict case herein cited" (P. 15). A short and ready answer to such argument is that no such defense was raised or counter suit filed, as was done in the *Benedict* case, and it may be assumed that had there been such defenses diligent counsel for Quality would have raised them.

Assn. of Westinghouse Salaried Employees v. *Westinghouse Elec. Corp.*, 348 U.S. 437; *International Ladies' Garment workers Union, AFL* v. *Jay-Ann Co., Inc.*, 5 Cir., 228 F. 2d 632 (1956); *United Steelworkers of America* v. *Pullman-Standard Car Mfg. Co.*, 3 Cir., 241 F. 2d 547 (1957).

F. The Seventh Circuit's Holding That a Trust Was Created Is Clearly Correct

In the Seventh Circuit, and in its Petition (pp. 15-16), Quality urged that "there must be delivery of the corpus or there can be no trust". The Seventh Circuit, referring to the Agreements' language that

> "Title to all moneys paid into *and or due and owing said Fund* shall be vested in and remain exclusively in the Trustees of the Fund . . .",

held that

> "*Under this language a trust was created, the corpus of which* was any money transferred or delivered by Quality to the trustees for the purposes of the agreement or which *Quality became obligated to transfer to the trustees* for that purpose" (P. 21; 270 F. 2d 142).

Trustees submit that the Seventh Circuit's conclusion of this issue wholly accords with applicable principles.

Under basic trust law, a valid existing trust must be based upon an existing property interest; but, if a trust is based upon an expectancy, it is created and may be enforceable upon the happening of the future event. Enforceability of such a trust is based upon a valid contract, supported by valuable consideration, providing for the creation of a trust. Consistent authorities establish the view that the obligation to create a future trust and to transfer the trust res to the

trust is contractual, and is enforceable upon the happening of a future event upon which the transfer of the trust res is dependent. Federal courts,[33] the Indiana court,[34] and leading text authorities alike sustain the rule's validity.[35]

Under the trust instrument's language which vested in the Trustees the title to all moneys "paid into *and or due and owing said Fund*", when Quality produced coal for use or for sale, the future and perhaps uncertain expectancy at the time of the trust instrument's execution became a reality. Quality's obligation to pay Trustees the royalty not only became due and owing, but title to that obligation vested in the Trustees. An executory trust supported by valuable consideration becomes enforceable when the trust res is acquired by the settlor; and this is particularly true here where Quality, as settlor, by contract passed title to the trust obligation to Trustees whenever royalty payments, the trust obligation, became due and owing.

Quality's contention (P. 16) that the Seventh Circuit's holding directly conflicts with Indiana law, citing *Kraus* v. *Kraus*, 235 Ind. 325, 132 N.E. 2d 608, 610, is unsound. Contrariwise, *Kraus* recognizes the validity of an agreement to make a gift in future if supported by valuable consideration.

[33] *Merritt Oil Corp.* v. *Young*, 10 Cir., 43 F. 2d 27, 29-30. *Universal Insurance Co.* v. *Steinbach*, 9 Cir., 170 F. 2d 303, 305.

[34] *Ramsdell* v. *Moore*, 153 Ind. 393, 53 N. E. 767.

[35] Restatement of the Law of Trusts (1935), Vol. I, Section 86(b), p. 345; Bogert, Trusts and Trustees (1951), Vol. I, Section 112, p. 507; Scott on Trusts, 2d Ed. (1956), Vol. I, Section 86, pp. 649-50.

CONCLUSION

For the foregoing reasons it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX I

Labor Management Relations Act, 1947

Section 7 [29 USCA 157]

"*Right of employees as to organization, collective bargaining, etc.*

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 8 [29 USCA 158]

"*Unfair labor practices*

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an

employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: . . .

". . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against any employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

". . ."

Section 302 [29 U.S.C.A. 186]:

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money

or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office

of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

* * * * * * * * *

APPENDIX II

169 **Trustees' Exhibit C**

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950

Effective March 5, 1950, to June 30, 1952

Executed at Washington, D. C., March 5, 1950

THIS AGREEMENT, made this 5th day of March, 1950, by and between the coal operators and associations signatory hereto hereinafter referred to as Operators, parties of the first part, and the International Union, United Mine Workers of America, hereinafter referred to as Mine Workers, on behalf of each member thereof, party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements previous agreements as herein provided.

* * *

WITNESSETH: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties, as defined and set forth in this Agreement. It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the employees of the parties of the first part. It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law, except in those exempted classifications of employment as hereinafter provided in this agreement. This provision does not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood. It is the intent and purpose of the parties

hereto that this agreement will promote and improve industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement.

MINE SAFETY PROGRAM

* * *

WORKMEN'S COMPENSATION AND OCCUPATIONAL DISEASES

* * *

170 UNITED MINE WORKERS OF AMERICA

WELFARE AND RETIREMENT FUND OF 1950

A. It is hereby stipulated and agreed by the contracting parties hereto that there is hereby created a Fund to be designated and known as the "United Mine Workers of America Welfare and Retirement Fund of 1950." During the life of this Agreement, there shall be paid into such Fund by each operator signatory hereto the sum of thirty cents (30¢) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale.

* * *

171 It is agreed that this Fund is an irrevocable trust created pursuant to Section 302 (c) of the "Labor-Management Relations Act, 1947," and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or State law; (3) benefits on account of sickness, temporary disability,

permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the "Labor-Management Relations Act, 1947," as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their families and dependents, and to employees of the Operators other than those exempted from this Agreement; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid "Labor-Management Relations Act, 1947." Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the "Labor-Management Relations Act, 1947," and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

The aforesaid Trustees shall designate a portion (which may be changed from time to time) of the payments herein provided, based upon proper actuarial computations, as a separate fund to be administered by the said Trustees herein described and to be used for providing for pensions or annuities for the members of the United Mine Workers of America or their families or dependents and such other persons as may be properly included as beneficiaries thereunder.

* * *

Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust

* * *

* * *

The obligation to make payments to the "United Mine Workers of America Welfare and Retirement Fund of

1950" under this contract shall become effective on March 6, 1950, and the first actual payments are to be made on April 10, 1950, and thereafter continuously on the 10th day of each succeeding calendar month covering the production of all coal for use or sale during the preceding month.

• • •

Failure of any Operator signatory hereto to make full and prompt payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" in the manner and on the dates herein provided shall, at the option of the United Mine Workers of America, be deemed a violation of this Agreement. This obligation of each Operator signatory hereto, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Operator during the life of this Agreement and it shall be deemed a violation of this Agreement if any mine to which this Agreement is applicable shall be sold, leased, sub-leased, assigned, or otherwise disposed of for the purpose of avoiding the obligation hereunder.

• • •

WAGES AND HOURS

• • •

VACATION PAYMENT

• • •

CHECKOFF

• • •

DISTRICT AGREEMENTS

• • •

SETTLEMENT OF LOCAL AND DISTRICT DISPUTES

• • •

HOUSE COAL

• • •

MISCELLANEOUS

• • •

TERMINATION OF AGREEMENT

• • •

NATIONAL CONFERENCES

• • •

INTEGRATED INSTRUMENT

This Agreement is an integrated instrument and its respective provisions are interdependent and shall be effective from and after March 5, 1950.

172 IN WITNESS WHEREOF, each of the parties signatory hereto, pursuant to proper authority, has caused this agreement to be signed by its proper officers or representatives at Washington, D. C., on this the 5th day of March, A. D., 1950.

District 8
UNITED MINE WORKERS OF AMERICA
March 15, 1950
JOHN L. LEWIS

OPERATORS -
Quality Coal Corporation
111 S. Forrest Ave.
Brazil, Indiana.
CARL F. KUMPF, *President*

• • •

175 **Trustees' Exhibit**

NATIONAL BITUMINOUS COAL WAGE
AGREEMENT OF 1950 AS AMENDED
SEPTEMBER 29, 1952

EFFECTIVE OCTOBER 1, 1952

• • •

NOW, THEREFORE, THIS AGREEMENT made this 29th day of September, 1952, by and between the coal operators, associations, companies and individuals signatory hereto (hereinafter referred to as "Operators"), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as "Mine Workers") on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends,

modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950" and all previous agreements as therein provided, such amendments, modifications and supplements being as follows, to wit:

* * *

UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950

Amend the first printed paragraph of subsection A by striking out of line four thereof the words and figures "thirty cents (30¢)" and inserting in lieu thereof the words and figures "forty cents (40¢)".

* * *

165 **Trustees' Exhibit A**

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950 AS AMENDED EFFECTIVE SEPTEMBER 1, 1955

* * *

NOW, THEREFORE, THIS AGREEMENT, effective September 1, 1955, by and between the coal operators, associations, companies and individuals signatory hereto and by and between such other and additional associations, companies and individuals as may hereafter become signatory hereto (hereinafter referred to as "Operators"), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as "Mine Workers") on behalf of each member thereof, as party of the second part, covering all the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952", the "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided, such amend-

ments, modifications and supplements being as follows, to wit:

WAGES AND HOURS

* * *

166 VACATION PAYMENT

* * *

TERMINATION OF AGREEMENT

* * *

167 **Trustees' Exhibit B**

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950 AS AMENDED EFFECTIVE OCTOBER 1, 1956

* * *

NOW, THEREFORE, THIS AGREEMENT effective October 1, 1956, by and between the coal operators, association, companies and individuals signatory hereto and by and between such other and additional associations, companies and individuals as may hereafter become signatory hereto (hereinafter referred to as "Operators"), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as "Mine Workers") on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952", the "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided, such amendments, modifications and supplements being as follows, to wit:

WAGES AND HOURS

* * *

168 VACATION PAYMENT

* * *

TERMINATION OF AGREEMENT

* * *

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1959

No. 517

QUALITY COAL CORPORATION
AN INDIANA CORPORATION
Petitioner,

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Respondents

Reply to Respondents Brief In Opposition

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Terre Haute, Indiana.

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INDEX

	Page
Reply to Respondents' Point A	1, 2, 3
Reply to Respondents' Point B	3-7
Reply to Respondents' Point C	7-12
Reply to Respondents' Point D	12
Reply to Respondents' Point E	12-15
Reply to Respondents' Point F	15
CONCLUSION	15

LIST OF AUTHORITIES CITED

Table of Cases

	Page
American Brake Shoe Co. vs. NLRB, 244 Fed. 2d 489	8
Birmingham vs. Bartels, 157 Fed. 2d 295	7
Gatliff Coal Co. vs. Cox, 152 Fed. 2d 52	12
Harris vs. Glucose Sugar Refining Co., 116 Fed. 304, 307-8 (1902)	10
Lewis, et all vs. Benedict Coal Corp. (1958), 259 Fed. 2d 346, 354	4, 6, 15
Lewis vs. Cable (1952), D. C., W. D. Pa., 107 F. Supp. 196	10
Lewis vs. Fentress, 160 Fed. Supp. 221	1
Lewis, et al. vs. Quality Coal Co., 243 Fed. 2d 769	12
NLRB vs. Broderick Wood Products Co., 261 Fed. 2d 548	6
NLRB vs. Gaynor News Co., 197 Fed. 2d 719, 723	6
NLRB vs. Gottfried Baking Co., 210 Fed. 2d 772	6
NLRB vs. McGraw & Co., 206 Fed. 2d 635	7
NLRB vs. Rockaway News Supply Co., 345 U.S. 71	2, 5
NLRB vs. Shuck Contr. Co., 243 Fed. 2d 519, 521	6
NLRB vs. United Brotherhood C & J, 202 Fed. 2d 516	7
Red Star Express Lines vs. NLRB, 196 Fed. 2d 78	6
United Marine Division vs. Essex Transportation Co., 216 Fed. 2d 410	14

Page

U. S. vs. Campbell, 139 Fed. 2d 424 14

U. S. vs. Carter, 1 L. Ed. (2) 776, 353 U. S. 210 13

U. S. vs. Embassy Restaurant, 359 U.S. 29, 3 L. Ed. 2d 601 13

U. S. Rubber vs. Moon, 93 Ind. Appellate 571, 179 N.E. 26, 28 9

Statute.

29 U.S.C.A. 158 (A) (3) 2, 3

29 U.S.C.A. 157 ..... 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1959.

No. 517

QUALITY COAL CORPORATION
AN INDIANA CORPORATION

Petitioner,

vs.

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,

Respondents.

REPLY TO RESPONDENTS POINT A

The majority opinion is in conflict with established law and contrary to other Circuit Courts of Appeal.

Respondent's argument is not sound. Their interpretation of various decisions is contrary to sound legal reasoning.

The decision of **Lewis vs. Fentress Coal and Coke Co., Inc.,** 160 Fed. Supp. 221, affirmed 264 Fed. 2nd, 134 is not in point. It is only fair to review the facts. No question of violating Federal Law was involved. The only contention was whether or

not the Contract violated the Tennessee Right to Work Law. Fentress contended that since the contract was executed in Washington, D.C., which permitted Union Shops, its enforcement in Tennessee was prohibited. This decision is not authority to support the majority opinion. Forcing non-union employees to join the Union on the morning of the third day not only violated Section 8 (A) (3) but it also violated 29 USCA, Section 157 and violation of these two Federal Sections were not raised in the Fentress Case.

Respondents are in error when they state that the majority opinion agrees with **NLRB vs. Rockaway News Supply Co.**, 345 U. S. 71. The issues were entirely foreign to the issues here. An employee refused to cross a rival picket line and was fired. The contract in the **Rockaway** case had a separability clause. Such is not the case in the agreements in the complaint. It will be noted in Resondent's Exhibit "C" in their brief under Appendix 2, at page 38, the following:

> "This agreement is an integrated instrument and its respective provisions are interdependent * * *."

The Rockaway Agreement had a separability clause.

Respondents say that the Union Security provisions on their face, show an intent to have a lawful meaning in view of the phrase "to the extent and in the manner permitted by law", and that the legal principle have no application. Since the evidence showed without question that in the operation under the agreement at the mine a Closed Shop was rigorously maintained, then and in what situations are principles of law to be applied? As Judge Schnackenberg stated in his dissenting opinion, at pages 27 and 28 of the petition,

> "As far as this case is concerned, by Judicial deci-

sion, a part of a federal act has been in effect repealed. The act was not saved; a contractual provision in violation of the act is saved."

The purported savings clause, "to the extent and in manner permitted by law," means that 29 USCA 158 prohibits forced membership before the 30 days grace period. It likewise means that 29 USCA 157 gives the worker the freedom to join the union at any time before the 30 days expires.

REPLY TO RESPONDENTS POINT B

The majority opinion notwithstanding undisputed evidence of forced union membership, creating a Closed Shop, saw fit to detour around Section 8 (A) (3) by avoiding the Closed Shop argument.

The majority opinion among other things at page 22 of the petition says:

"The provisions of § 158 (a) (3) do not prohibit as unfair labor practice, or invalidate, collective bargaining agreements requiring union membership as a condition of employment provided becoming such a member may be deferred to or after the thirtieth day following the beginning of employment, or effective date of the agreement, whichever is later."

How can this statement be reconciled with the evidence in the record of forced union membership on the morning of the 3rd day of employment?

The opinion at the same page, among other things continues:

"Of course, without the portion italicized (the grace

period of 30 days) above the provisions of the agreement here under consideration would violate § 158, **Lewis** vs. **Jackson & Squire**, D. C. 86 F Supp. 354 * * *."

The majority opinion admits that if the 30 day grace period were omitted, the contract would be void. Yet, the fact that a closed shop was maintained was ignored.

The majority opinion further states, among other things:

> "The qualified condition imposed is expressed as one complete provision. Its application is not to be measured by some standard found elsewhere in the contract."

This is in direct conflict with Lewis et al., vs. Benedict Coal Corporation, (1958), 259 Fed. (2) 346, 354, which held that where an agreement is an integrated instrument and its respective provisions are inter-dependent, the agreement must be considered in its entirety.

At page 12 of their brief Respondents continue to quote from the Fentress Case as being the sole precedent. We have already distinguished this decision.

If any fatuous reasoning has been used, Respondents are certainly past masters in this field. They continue by stating the interpretative processes so used would be at odds with principles which denounces the right of Courts to ignore expressed provisions of a contract. How naive can one reason? What about ignoring the express letter of the law?

Respondents at page 13 of their brief infer that where two constructions may be made, the lawful construction must be invoked. We find no quarrel with this statement. There is only one construction to be made in this case. The majority opinion has seen fit to, in our opinion, to make the wrong one.

The Rockaway Case at page 14, of their brief, is com-

pletely foreign here. There was a separability clause and the quotation is not applicable in this case.

Again respondents do a "Houdini" in quoting from the **N.I.R.B. Vs. Rockaway News Supply Co., 345 U.S. 71.** However, either innocently or deliberately, at page 79, line 6 to line 10, they overlooked the folowing:

> "Moreover, there is no showing that these illegal provisions in any way affect Waugh's employment, his discharge, or any conduct of any party that is relevant to the decision."

We have shown the illegal conduct of the Union and have shown by evidence which is not controverted that the law was violated. The condition precedent in the contract as to union members was a violation of the law.

The quotation of the majority opinion at page 16 of respondent's brief is contrary and in conflict with the closed shop prohibition.

We certainly admit that the 30 day grace period must be read into the contract. When the Union forced Management into a closed shop, the contract was nullified. The fact that the 30 day grace must be read into a contract did not stop the action of the Union in enforcing the illegal clause of employment in the contract by forcing non union members to join the Union within 72 hours after employment.

Again at page 15, respondents find fault with the dissenting opinion by quoting the Fentress Case. Fentress has no application here.

2.

The Authorities Submitted By Quality Are Controlling. Respondents attempt to explain away the rulings in the

Gottfried, Red Star and **Gaynor Cases**, to say the least, lacks good legal reasoning. In order not to burden this Court with repetitions, we refer to pages 28 and 29 of our petition wherein Judge Schnackenberg reviews these cases.

Without unduly extending our remarks we cannot help but refer the Court to the three cases following:

The "savings clause" being a provision of the Agreement and since the respective provisions were interdependent on one another, the Agreement had to be considered in its entirety. Therefore, the illegal provision destroyed the entire Agreement. (**Lewis et al. v. Benedict Coal Corp.** (1958), 259 Fed. 2d 346, 354.)

It was held in **NLRB v. Broderick Wood Product Co., et al.** (1985), 261 Fed. 2d 548, 555, 556, 557 that the savings clause did not salvage or save the illegal clause in the contract. The Court stated, at p. 558:

> "The mere execution . . . . * * * is itself an unfair labor practice within the Act. The savings clause does not avoid that rule."

In **N. L. R. B. v. E. F. Shuck Construction Co.**, 9 Cir., 243 F. 2d 519, at p. 521, the Court stated, concerning another illegal union-security clause:

> "The mere retention of such a clause in a contract in force between the parties is a continuing unfair labor practice even when there is no attempt to enforce it, because so long as it remains a part of the contract it 'tends to encourage membership in a labor organization' in violation of Section 8(a) (3)."

It can readily be seen that the mere retention of such a clause without enforcing it violates the Act.

Respondents explanation of the **United Brotherhood C. & J.** and **McGraw** cases at page 19 of their brief, in our opinion is very weak. Without too much stress, we cannot help but refer you to page 9 of our petition, wherein the **McGraw** case is cited. The Court therein held a violation of the Act if the Union, "entered into, maintains, or causes the enforcement of a closed Shop."

Respondents try to force adherence to the **Rockaway Case** by quoting excerpts therefrom which are abstract propositions of law and which do not coincide with the issues here. Again the **Rockaway** agreement had a separability clause which does not exist in the **Quality** Case. Hence, the Court's statement,

> "The total obliteration of this contract is not in obedience to any command of the statute . . . ."

is not binding and of no force in this cause.

REPLY TO RESPONDENTS POINT C.

The Seventh Circuit's decision that the defense of Duress was without merit, was based on an authority completely foreign to the issues before it.

The Contract Was Void Because it Was Made Under Duress.

The majority opinion states:

> "The threat to cause a legal strike and its attendant work stoppage does not of itself constitute duress and mere inequality in economic bargaining power is not legal unfairness which will permit either party to avoid a contract."

This statement is quoted from **Birmingham v. Bartels**, 157 Fed. 2d 295. The majority opinion no doubt, in quoting

from the **Birmingham** case, overlooked part of the **Birmingham** opinion in this, to-wit:—

> "A Court of law cannot acknowledge a contract because of alleged unfairness in the negotiation by which the obligation has been created, **unless the unfairness amounts to duress or fraud capable of avoiding the contract. Duress or fraud has not been set up here, nor has either of them attempted to be proved.**" (Our emphasis.)

Numerous undisputed affidavits are in the record showing that duress was perpetrated on this operator. (Record pp. 101-105; Record pp. 193-198.) The **Birmingham** case with the omission considered over-rules the majority opinion. In the case at Bar the evidence was replete that the operator was coerced in executing the Agreement, and the evidence sustained the affirmative defenses.

(1)

Legal Strikes Are Permitted.

We agree that legal strikes are permitted. The majority opinion invokes this law in its decision by citing **American Brake Shoe Co. vs. N. L. R. B.**, 244 Fed. 2nd 489, but the majority opinion goes too far; the admitted facts in the record show that a closed shop had been rigorously maintained. In the American Brake case the majority opinion have no doubt innocently overlooked the Courts comment at page 492 as follows:

> "However, as has been observed by the Board, the rights of the employees to engage in collective bargaining and to strike in furtherance of their economic demands must **be balanced against the employers rights to protect his business against loss.**"

Again, in the same case at the same page, the Court states:

> "Indeed the Board has held, in a series of cases that, **where unusual economic hardship or operative conditions are found to exist, an employer faced with a threatened or actual strike, may take certain protective measures.**" (our emphasis)

In view of the record before it, how can the majority opinion be justified when a closed shop was rigorously maintained?

In **U. S. Rubber Co. v. Moon**, 93 Ind. App. 571, 179 N. E. 26, 28, the Court held:

> "It is not the threat of criminal prosecution * * * that constitutes duress, but the condition of the mind produced thereby. The threat must be of such nature and made under such circumstances as to * * * control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by said person while in such condition."

Contracts Were Not Ratified.

Respondents seem to overlook essential facts. Petitioner at no time ratified said contracts. Not one cent was paid into the pension fund. Certainly, we admitted many tons of coal were mined. The checking off of union dues was legitimate and in compliance with Indiana law and was money deducted from each employee to pay their dues. This does not detract from the fact that the contracts were illegal nor that this was a closed shop nor does it go to show the state of mind of the employer in executing the contract.

The case of **U. S. Rubber Co. v. Moon** has no bearing here. No payments to the pension fund were made.

Defendants Are Not Estopped to Set Up Duress.

What we know as men, surely we know as judges and lawyers. Here is a small operator who, under mental coercion, in order to preserve his business and to maintain some 55 miners at work, did involuntarily and contrary to his free will, execute the agreement. These miners loaned the money to keep this mine operating in order to preserve their jobs. Respondents state that petitioner is attempting to deprive the same employees of benefits from the fund. They further state that Quality's effort is in conflict with good conscience and equity. These 50 or 55 employees, realizing if the mine had been sold under a former judgment, the mine would have been closed and they would have been out of a job. They were more concerned with present income and not pensions in the future.

Appellee cites **Harris** v. **Glucose Sugar Refining Co.**, 116 Fed. 304, 307-8 (1902), which has no bearing on this case. That case involved the appellant who signed a five-year contract and then agreed not to work for a competitive firm. He violated that clause and appellee filed suit for an injunction. Appellant raised the objection that appellee was an illegal trust, condemned by the State of Ilinois. They held that they could not on one hand take the benefit of the bargain and on the other, defend on the grounds of the illegality of the combination. This in no way affects the present suit for the reason that the illegal action is based upon the forcing of employees joining the Union within three days and not the required thirty days, and if petitioner had not signed the contract, the employees would have stopped work and the mine would have been shut down.

Respondents cite **Lewis v. Cable**, 1952, D. C., W. D. Pa., 107 F. Supp. 196. This case is distinguishable. Cable made

substantial payments and thereafter a year later wrote a letter that the balance would be paid by his broker upon sale of coal. Cable filed an affidavit that the payments were made under infuence of fear of strike and repercussions which would entail irreparable loss, etc. Respondents would urge that the Cable case is identical to present case. This is not true. Cable made payments and promised to pay the balance. At no time did Cable plead the affirmative defenses we have. He did not raise mental coercion, duress, illegality of contract, closed shop, preferential hiring, no legal trust, unilateral contract, improper parties.

The Court in the Cable case stated:

> "In fact we are of the opinion that proof of his subjective intent is not material and would not be admissible in evidence."

Petitioner, insofar as the facts and pleadings in the present care are involved, takes issue with the above. As otherwise stated in our pleadings and briefs, the condition of the mind of defendant and the question of reality of assent are controlling.

The Court stated further in the Cable case:

> "If he thought this was sheer extortion, he would not have paid it. The same is true of the promise in his letters to continue payments after he returned to work. If he did not believe he owed the money, he should not have acknowledged the debt. Under these facts, defendant was under a duty to repudiate liability under the agreement before making payment or acknowledging liability."

At no time has petitioner in this case made any payments nor have they ratified the contract nor could the validity of the contract be raised at any time prior to this

law suit being filed. Hence, this authority is not in point.

We are indeed impressed with respondents reference to the fable of Aesop at page 23 of their brief. This Court will determine to whom it applies. We are reminded of a saying in the Babylonian Talmud, Chullin, Fo. 94. B. (C.450 as follows:—

"It is Forbidden to Deceive Even A Heathen."

REPLY TO RESPONDENTS POINT D.

Contract Was Unilateral and Void.

The **Gatliff Coal Company** case cited by Respondents at page 24 of their Brief has no bearing whatever. That was an action for wages based upon a written agreement by an Operator and Union. The Operator contended that a verbal agreement with the Union representative which placed a limit on the wages was binding. The Court held that the act compelled collective bargaining agreements to be in writing, and therefore the defendant was precluded from setting up the oral agreement as a defense.

In order to avoid repetition on this point, we refer the reader to our petition at page 14.

REPLY TO RESPONDENTS POINT E.

1.

INDISPENSABLE PARTIES LACKING

Respondents cite the first **Quality** case (243 Fed. 2nd 771). As we have previously mentioned, the only thing then before the Court was a complaint and answers to interrogatories, and no affirmative defenses. In the present case, Quality has raised issues by affirmative defenses which were

not in the first **Quality** case, and the first **Quality** case is not controlling.

The case of **United States** v. **Embassy Restaurant** cited does not in any way assist. The decision therein held that contributions to a Welfare Fund were not wages and was enforceable by the Trustees by virtue of the collective bargaining agreement.

The case of **United States** v. **Carter**, 1 L. Ed. (2d) 776, 353 U. S. 210, pertained to the interpretation of the Miller Act with reference to construction work on Federal projects and whether the contractor's bond was liable under the Act. The contract involved provided, "The Trustees had sole power to demand and enforce prompt payment of employer contribution." No such clause is in the contracts alleged in the amended complaint.

The contracts involved in this present litigation provide:

> " * * * for the exclusive use and benefit of the contracting parties."

Since the **Carter** case involved the interpretation of a Federal Act and in view of the expressed right of the Trustees as set out in the contract, the Court made its decision on those issues, which are not involved here and are not controlling.

The quotation in the **Carter** case wherein the Trustees had exclusive right to enforce it, is in complete harmony with the contract giving Trustees exclusive right. But how can they reconcile the fact the Union negotiated the contract on behalf of the workers and how can they explain the agreement of March 5, 1950 at Page 39 of their brief which provides:

> "Failure of any operator signatory hereto to make full and prompt payments of the amounts required

> hereby, in the manner and on the dates herein provided, **shall at the option of the United Mine Workers of America, be deemed a violation of this agreement** * * *." (our emphasis)

There are no allegations in the seconded amended complaint that the United Mine Workers of America, have declared a violation on part of petitioner. The only allegation in Rhetorical paragraph 6, is that respondents have demanded payments of petitioner which was refused. Petitioner's 6th Rhetorical paragraph of 1st defense denies they owe plaintiffs. Hence it is a condition precedent that the United Mine Workers of America declare a violation which has not been done.

Since the United Mine Workers of America must declare a violatior, then they are the real party in interest, and an indispensable party to this law suit.

> "Rights of 3rd parties to sue on a contract entered into for his benefit are no greater than those of the parties thereto, and the beneficiary who seeks to take advantage of the contract must take it subject to the defenses and inherent equities between promisor and promisee." U. S. v. **Campbell**, 138 Fed. (2) 424.

Contractual rights must be enforced, in action at law or in equity in the name of the injured contracting party. **State Ex Rel.** v. **Brand**, 214 Ind. 347, 13 NE (2) 955, Sup.

Relative to **United Marine** v. **Essex Transportation Company**, cited by respondent at Page 27, the agreement in that case was oral and the only question was whether or not the payment of money was a promise to pay "any representative of any of his employees", in violation of Section 186 (a), (b), therefore that case has no bearing whatsoever.

Respondents seem to take a great pride in quoting out of context from the various court decisions submitted by them. In the reading of said cases in their entirety, it does not appear that they sustain the conclusions which respondents urge upon this court. What is so aborative in citing **Lewis** vs **Benedict Coal Co.**, 259 Fed., 2, 346? This case is now before this Court. And it remains the law until this Court states otherwise.

There is no question in our mind that the 2nd Circuit handed down a correct ruling. It is mighty easy for the Union to force the operator to submit to impossible demands and threaten them with unlawful shutdowns and when the illegal actions are submitted to a Court, they go into platitudes to justify their actions.

REPLY TO RESPONDENTS POINT F.

No Trust Was Created.

Without prolonging the reply to this point, we respectfully adopt by reference our statement at pages 16 and 17 of our petition.

In conclusion we say that bound as we are by the record in this case, it seems reasonable to conclude that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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